

No. 13103

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA and
LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 336, inclusive)

Appeal from the United States District Court for the
Southern District of California, Central Division

FILED
DEC 24 1951



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for the Ninth Circuit

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Irl D. Brett.....	18
Exhibit 1—Trust Patent by the President, Grover Cleveland, May 14, 1896.....	23
Answer to Petition and Order to Show Cause in re Supplemental Decree, etc.....	28
Appeal:	
Certificate of Clerk to Transcript of Record on	97
Designation of Record on (DC).....	90
Notice of (Filed June 30, 1948).....	62
Notice of (Filed July 20, 1951).....	87
Order Extending Time to Docket.....	95
Order for Consideration of Original Exhibits on (USCA)	658
Statement of Points and Designation of Rec- ord on (USCA)	656
Statement of Points on (DC).....	88
Certificate of Clerk to Transcript of Record on Appeal	97
Designation of Record on Appeal (DC).....	90

Findings of Fact and Conclusions of Law:

Filed May 3, 1948	47
Filed April 5, 1951.....	67
Judgment filed May 3, 1948.....	57
Judgment and Supplemental Decree filed April 5, 1951	75
Minute Order, Feb. 16, 1951—Hearing on Oral Argument on Attorneys' Fees, etc.....	66
Motion for Consideration of Original Exhibits (USCA)	657
Motion for New Trial, to Amend Findings of Fact, etc.	80
Motion of USA to Dismiss, Special Appearance and	16
Motion to Strike Portion of Testimony of Joseph A. Gallagher, Sr., filed Feb. 16, 1951	63
Motion to Strike Testimony of Joseph A. Gal- lagher and Benton Beckley, filed Feb. 20, 1948	40
Names and Addresses of Attorneys.....	1
Notice of Appeal:	
Filed June 30, 1948.....	62
Filed July 20, 1951.....	87
Order Denying Dismissal.....	27
Order Denying Motion for New Trial.....	83
Order Denying Motion to Amend Findings of Fact, etc.	85
Order Extending Time to Docket Appeal.....	95

Order for Consideration of Original Exhibits (USCA)	658
Order to Show Cause.....	14
Petition for Supplemental Decree for Attorneys' Fees and Expenses, for Sale of Property and for Appointment of Receiver.....	3
Special Appearance of, and Motion to Dismiss by, USA	16
Statement of Points on Appeal (DC).....	88
Statement of Points and Designation of Rec- ord on Appeal (USCA).....	656
Reporter's Transcript of Proceedings:	
Excerpts from Proceedings of Feb. 10, 11, 12, 20, March 9, 1948.....	99
March 29, 1948	214
March 30, 1948	253
March 31, 1948—Oral Opinion of the Court..	378
February 7, 1951	386
February 16, 1951	445
May 7, 1951—Hearing Motion for New Trial and to Amend Findings and Judgment, etc.	446
Exhibits for Petitioner:	
1—Copy of Letter dated Jan. 2, 1941, David D. Sallee to John W. Dady, Supt., Mis- sion Indian Agency	463
Admitted in Evidence.....	100

Exhibits for Petitioner—(Continued)

2—Copy of Letter dated Nov. 11, 1942, David D. Sallee to John W. Dady.....	464
Admitted in Evidence	100
3—Copy of Letter dated Nov. 16, 1942, David D. Sallee to Dept. of the Interior, Indian Office	465
Admitted in Evidence	100
4—Interrogations	466
Admitted in Evidence	100
4A—Statement of Facts Filed 2/10/48.....	516
Admitted in Evidence	102
4B—John W. Preston's Statement of Account re Lee Arenas dated 1/22/48.....	528
Admitted in Evidence	102
5—Stipulation re Employment of Attorneys, etc., for Lee Arenas, filed Feb. 10, 1948..	528
6—Agreement dated Nov. 20, 1940, by and between Lee Arenas and David D. Sallee..	530
6A—Copy of Letter, June 3, 1943, Walter V. Woehike, Asst. to Com. of Indian Affairs, to David D. Sallee	540
7—Power of Attorney and Contract, Lee Arenas, dated Feb. 1, 1945.....	544
8—Power of Attorney and Contract, Marian Therese Arenas, Feb. 1, 1945.....	546
15—(Identification)—Map of Section 14, T4S R4E	549
Marked for Identification.....	131

Exhibits for Petitioner—(Continued)

16—(Identification)—Map of Section 26, T4S R4E	550
Marked for Identification	131
18—Signature of Lee Arenas.....	551
20—Statements re Complaints prepared under Power of Attorneys in 1945, filed 3/8/48..	553

Exhibits for Respondent:

D—Letter dated Nov. 7, 1944, David D. Sallee to Mr. and Mrs. Lee Arenas.....	554
F—Testimony of Donald C. Jones as to his Qualifications as an Expert Real Estate Appraiser	556
G—Appraisal Report submitted by Donald C. Jones, Feb. 1948	572
H—Testimony of Bernard G. Evans re Quali- fications	597
I—Appraisal submitted by Bernard G. Evans, Feb. 1948	604
K—Letter dated Dec. 5, 1944, David D. Sallee to James A. Murray, Dept. of Justice, Lands Division	624
L—Letter dated Dec. 28, 1943, David D. Sallee to Mr. and Mrs. Lee Arenas.....	625
N—Letter, Sept. 24, 1943, David D. Sallee to Mr. and Mrs. Lee Arenas, filed 3/29/48..	359
Admitted in Evidence	216
N—(Defendant's—filed 2/7/51) Stipulation..	627
Admitted in Evidence	396

Exhibits for Respondent—(Continued)

O—(Defendant's)—Portions of Testimony of Joseph A. Gallagher, Sr., Nov. 29, 1950..	629
Admitted in Evidence	396
P—Public Law 322, 81st Congress, Chapter 604, 1st Session, HR 5310	652
Admitted in Evidence	397
Q—Public Law 904, 81st Congress, Chapter 1192, 2d Session, HR 9272.....	654
Admitted in Evidence	398
R—Hypothetical Question	431

Witnesses:

Beckley, Benton

—direct	196
—cross	199

Gallagher, Joseph A.

—direct	103
—cross	133
—recalled, cross	173, 183, 399
—redirect	429

Jones, Donald C.

—direct	429
—cross	438
—redirect	441

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For Appellees:

JOHN W. PRESTON,

OLIVER O. CLARK,

DAVID D. SALLEE,
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458 S. Spring St.
Los Angeles 13, Calif. [1]*

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

No. 1321 O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR SUPPLEMENTAL DECREE
FOR ATTORNEYS' FEES AND EXPENSES
ADVANCED, FOR SALE OF PROPERTY
AND FOR APPOINTMENT OF RECEIVER.

The petition of John W. Preston, Oliver O. Clark
and David D. Sallee, respectfully alleges:

I.

That the above entitled action was begun in this Court on the 24th day of December, 1940, and this Court rendered judgment therein on the 14th day of May, 1945, adjudging that plaintiff was entitled to trust patents to the lands allotted in 1923 and re-allotted in 1927 to Lee Arenas, Guadalupe Arenas, Francisco Arenas and Simon Arenas. That the United States of America appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and said Court on the 12th day of December, 1946, affirmed that portion of said judgment adjudging that plaintiff was entitled to trust patents to the lands allotted to Lee Arenas and Guadalupe Arenas, but decreed that plaintiff was

not entitled to [2] trust patents to the lands allotted to Francisco Arenas and Simon Arenas. That thereafter plaintiff filed a petition for a writ of certiorari to said Circuit Court of Appeals in the Supreme Court of the United States, which was denied by said Court on the 9th day of June, 1947. That the judgment of this Court, as modified by the Circuit Court of Appeals, is final.

II.

That petitioners acted as attorneys for plaintiff at his request throughout the litigation. That originally their employment was evidenced by a written contract approved by this Court and dated November 20, 1940. That said contract was later, to wit, on the 1st day of February, 1945, superseded by a new contract with petitioners, which provided as follows:

“I hereby agree to pay my said attorneys upon a quantum meruit basis for services rendered and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family.”

III.

That the plaintiff, Lee Arenas, was at all times mentioned herein, and is now, a duly enrolled and recognized member of the Agua Caliente or Palm Springs Band of Mission Indians and has at all such times resided upon the Reservation of said Band of Indians in the County of Riverside, State of California.

IV.

That by the final judgment in this action, as modified by the United States Circuit Court of Appeals for the Ninth Circuit, it was decreed that plaintiff was, and is, entitled to trust patents to the lands allotted in 1927 to Lee Arenas and to Guadalupe Arenas, his wife, which lands are more particularly described as follows, to wit: [3]

Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $E\frac{1}{2}$ $SW\frac{1}{4}$ $NW\frac{1}{4}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$ and $SW\frac{1}{4}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.

Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $SE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.

V.

That the application for allotment, and the selections of lands for allotment, made by Lee Arenas

and Guadalupe Arenas, and the proceedings had thereon in 1927, including the certification and submission of the allotment schedule to the Secretary of the Interior by H. E. Wadsworth, the United States Special Allotting Agent at Large for the Mission Indian Reservations in California, and the certificates issued by said Special Allotting Agent to Lee Arenas and Guadalupe Arenas, were declared and adjudged by this Court to be in all respects legal and binding against the United States in the judgment rendered by this Court on the 14th day of May, 1945, and by the United States Circuit Court of Appeals for the Ninth Circuit, except as modified by the decree of said [4] Circuit Court of Appeals.

VI.

That by the decree of the United States Circuit Court of Appeals for the Ninth Circuit in this action, the date upon which the period of restriction on alienation shall begin to run, as prescribed by Section 5 of the Act of January 12, 1891 (26 Stat. L. 712), is the 9th day of May, 1927.

VII.

That all of the lands described in Paragraph IV hereof lie within or near the City of Palm Springs, County of Riverside, State of California, and taken together the said lands have a present day value in excess of One Million Dollars (\$1,000,000.00). That portions of said lands, at the present time, are producing rentals of the value of about Seven Thousand Five Hundred Dollars (\$7,500.00) per annum; but

if said lands are properly managed and handled, they should produce in rentals a much larger sum per annum, to wit, a sum in excess of Twenty Thousand Dollars (\$20,000.00).

VIII.

That petitioners have not been paid, nor have they received, any sum whatsoever for their services in this action which have extended over a period of more than six years. That petitioners have advanced for necessary expenses in prosecuting this action the sum of Two Hundred Fifty-eight Dollars and Sixty-seven Cents (\$258.67), no part of which sum has been paid or refunded to them.

IX.

That the following is a brief description and recital of the work done and performed by the petitioners in this case, to wit:

The complaint was prepared by petitioners and filed in this action on the 24th day of December, 1940. Thereafter three amended [5] complaints were prepared and filed by petitioners. The pleadings presented extraordinary difficulties, arising out of unique and unusual legal questions and factual situations.

Two trials of the action were had in this Court; two appeals were conducted from the judgments of this Court to the Circuit Court of Appeals for the Ninth Circuit, both appeals being elaborately briefed by petitioners; two petitions for rehearing were prepared and filed by petitioners; two petitions for

writs of certiorari to the Circuit Court of Appeals were prepared and filed in the Supreme Court of the United States, with supporting briefs and records, the first of which petitions was granted and the cause was thereupon rebriefed, heard and argued orally in the Supreme Court of the United States, resulting in a reversal of the first judgment herein; and the second petition for certiorari was denied by the Supreme Court on the 9th day of June, 1947.

That a more particular and chronological statement of the steps taken, and of the work done by petitioners, in this cause is as follows:

The original complaint was filed on December 24, 1940;

First Amended Complaint was filed;

Second Amended Complaint, 48 pages, filed October 27, 1941;

Motion of defendant, United States of America, to dismiss and motion for summary judgment filed November 29, 1941; the latter motion was heard on January 12, 1942 and was postponed until January 26, 1942, and was granted on March 6, 1942;

Plaintiff's Notice of Appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit was filed June 4, 1942;

The Record on Appeal was filed August 21, 1942;

Plaintiff's Opening Brief, 45 pages, and appendix thereto, 6 pages, filed November 16, 1942; [6]

Brief for United States of America filed December 11, 1942;

Plaintiff's Reply Brief, 7 pages, filed January 26, 1943;

Judgment of District Court affirmed June 30, 1943;

Petition for Rehearing filed July 23, 1943; Rehearing denied August 4, 1943;

Petition for Writ of Certiorari and supporting brief, 23 pages, with supporting record, 78 pages, filed in Supreme Court of the United States October 29, 1943;

Writ of Certiorari granted by Supreme Court December 20, 1943;

Supplemental Brief of plaintiff, 25 pages, filed February 25, 1944; cause argued by two of plaintiff's counsel in Supreme Court on March 6 and 7, 1944;

Order of Supreme Court reversing judgment below entered May 22, 1944;

Thereafter, on January 9, 1945, petitioners filed a third amended complaint for plaintiff to conform to the opinion of the Supreme Court of the United States;

The cause was prepared for trial, and the trial was had upon the issues raised by the third amended complaint and the answer thereto on January 30 and 31, 1945;

The evidence and exhibits introduced comprised approximately 600 printed pages, the exhibits alone being more than 200 pages;

Judgment for plaintiff was rendered by this Court on May 14, 1945, based upon elaborate find-

ings of fact and conclusions of law, prepared by petitioners, consisting of 29 pages;

The United States of America made many objections to the findings, and also made motions to set them aside, requiring attendance and argument thereof by petitioners in open Court;

The United States of America appealed from the judgment to the Circuit Court of Appeals for the Ninth Circuit on August 8, 1945;

Both parties filed elaborate briefs in said Court, [7] plaintiff's brief containing 39 pages; and thereafter petitioners argued the case orally in said Court;

On December 12, 1946, the Circuit Court of Appeals made and entered its decree, affirming said judgment in part and reversing it in part, the effect of which decision was to give plaintiff the lands allotted in 1927 to him and to his wife, Guadalupe Arenas, consisting of 94 acres more or less, and denying plaintiff the lands allotted to Francisco Arenas and Simon Arenas, father and brother, respectively, of plaintiff;

Petitioners thereupon prepared and filed in said Court on January 13, 1947, a petition for a rehearing, consisting of 15 pages, and said petition was denied on January 14, 1947. Petitioners thereafter prepared a record of the case for filing in the Supreme Court of the United States, consisting of 676 printed pages, in support of a petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, which petition and supporting brief and appendix thereto, consisting of 32 pages was,

within the time allowed by law, filed in the Supreme Court of the United States, and by that Court was denied on June 9, 1947.

X.

That petitioners have not kept an accurate record of the time spent in the work done by them in the course of this litigation, but they estimate that the number of Court appearances exceeded fifty (50) and that the number of man days spent in office work on the case was from two hundred and fifty (250) to three hundred (300).

XI.

That the property awarded to plaintiff by the judgment in this action consists of four (4) acres in Section 14, Twp. 4 S., R. 4 E of San Ber. M., in the heart of the City of Palm Springs, and ninety (90) acres in Section 26, Twp. 4 S., R. 4 E of San Ber. M., situated near the business area of said city. That said ninety [8] (90) acres is now being used as a motor court on which there are some forty (40) structures used in connection therewith. That plaintiff, Lee Arenas, is more than seventy (70) years of age, is in feeble health, and is physically unable to care for said property. That if said property were in the hands of a competent manager, the annual income therefrom would probably exceed Twenty Thousand Dollars (\$20,000.00), but under the present management thereof the annual income from said property is about Seven Thousand Five Hundred Dollars (\$7,500.00).

That the compensation of petitioners for services rendered in this case must be paid either from the

proceeds of a sale of said property, or from a portion of the income derived therefrom in which latter event it would probably require a substantial part of such income for a period of many years to pay the compensation due to petitioners.

XII.

Petitioners allege that an amount equal to thirty-three and one-third percent ($33\frac{1}{3}\%$) of the actual present day value of plaintiff's property, described in Paragraph IV hereof, would be a reasonable fee to them for the services rendered to plaintiff in securing the allotments awarded plaintiff by the judgment of this Court, as modified by the decree of the Circuit Court of Appeals.

XIII.

That petitioners are entitled to have a lien impressed upon plaintiff's property to secure the amount due them pending the full payment thereof.

XIV.

That by reason of the facts alleged in this petition a receiver should be appointed by the Court to take charge of plaintiff's said property and to manage and operate the same under the orders of the Court, so that the greatest amount of income possible may be derived therefrom, to the end that both plaintiff [9] and petitioners may receive such portions of the income as the Court may deem just and proper, the amounts paid to petitioners to be credited upon the judgment awarded by the Court to petitioners.

Wherefore, the petitioners pray:

1. That an order to show cause, directed to the

United States of America and to the plaintiff, Lee Arenas, issue fixing the time and place for the hearing of this petition;

2. That petitioners have judgment against the plaintiff, Lee Arenas, for an amount equal to thirty-three and one-third per cent ($33\frac{1}{3}\%$) of the present day value of the property described in Paragraph IV of this petition, as fees for the services rendered by them to plaintiff in this action, and for the further sum of Two Hundred Fifty-Eight and $67/100$ Dollars (\$258.67) advanced by petitioners as and for necessary expenses in prosecuting this action;

3. That it be adjudged that petitioners have a lien, and that said lien be fixed and impressed, upon the property of plaintiff, described in Paragraph IV of this petition, to secure the amounts which the Court may find to be due to petitioners, until such time as the amount adjudged by the Court to be due the petitioners is fully paid;

4. That such portion of said property as may be necessary to satisfy the judgment awarded to petitioners herein be sold according to law by a Commissioner appointed by this Court, free from any restriction upon the alienation thereof, and that the proceeds of such sale be applied to the payment of said judgment, and the balance of the proceeds of such sale, if any, be distributed to the plaintiff, or otherwise disposed of as the Court may direct;

5. That, if the Court shall not order said property sold, then and in that event that the Court appoint a receiver to take charge of, manage and operate said property, and to receive and disburse

the net income therefrom to the plaintiff and to the [10] Petitioners in such manner and in such amounts and at such times as the Court may order and direct;

6. That Petitioners have such other and further relief as to the Court may seem just and proper.

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
By /s/ JOHN W. PRESTON,
Petitioners.

Acknowledgement of Service attached.

[Endorsed]: Filed Oct. 24, 1947. [11]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the Petition of John W. Preston, Oliver O. Clark and David D. Sallee, Esqs., for a supplemental decree for the allowance of attorneys' fees for services rendered by them to the above named plaintiff, Lee Arenas, and for expenses advanced by them for said plaintiff, in the above entitled cause, and for the sale of a sufficient portion of the lands allotted to said plaintiff to pay the amount of attorneys' fees that shall be awarded by the Court to said Petitioners and expenses advanced by them on behalf of said plaintiff, and it appearing to the satisfaction of the Court therefrom and also from the judgment heretofore rendered in this cause that the Court retained "jurisdiction over this

action and the subject matter thereof for the purpose of adjudicating the reasonable sums that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in this action and for expenses necessarily incurred by them in his behalf in the prosecution thereof, [13] and for the purpose of making all necessary and proper orders, judgments and decrees for the securing and payment of all such sums so found due and owing by the plaintiff to said attorneys'', that this is a proper case for the issuance of an order to show cause to the plaintiff, Lee Arenas, to appear in this Court and answer to said petition;

Now, Therefore, It Is Hereby Ordered that the plaintiff, Lee Arenas, be and appear before this Court in the courtroom of the Honorable Wm. C. Mathes, one of the Judges thereof, at the hour of 10 a.m., on the 16 day of December, 1947, then and there to show cause, if any he has, why attorneys' fees and expenses advanced by them should not be allowed and paid to the Petitioners, John W. Preston, Oliver O. Clark and David D. Sallee, Esqs., in the amounts prayed for and for other relief as set forth in their said Petition.

It Is Further Ordered that a copy of the Petition of John W. Preston, Oliver O. Clark and David D. Sallee and this order be served on the plaintiff, Lee Arenas, not later than the 15 day of November, 1947.

Dated this 24 day of October, 1947.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Filed Oct. 24, 1947. [14]

[Title of District Court and Cause.]

**SPECIAL APPEARANCE OF, AND MOTION
TO DISMISS BY, THE UNITED STATES
OF AMERICA.**

Comes Now the United States of America and appearing specially and solely for the purpose of this motion to dismiss and not otherwise, moves this Honorable Court to dismiss the Order to Show Cause in the above numbered and entitled proceedings heretofore noticed before this Court for 10:00 a.m. on December 16, 1947, in the courtroom of the Honorable Wm. C. Mathes, one of the Judges thereof, in so far as said Order to Show Cause, and the petition upon which it is based, are directed toward the procuring of an order, or orders, by this Court:

1. Affecting lands, the title to which is vested in the United States, to-wit, the lands described in paragraph IV of said petition.

2. Directing the sale of, or the sequestration of, said lands.

3. Appointing a receiver to take charge of, or to manage, or to operate, or in any manner to affect and supersede the lawful supervision and regulation of said lands by the United States, by and through the Secretary of the Interior of the United States.

4. Appropriating or sequestering, or otherwise affecting or disposing of the income from said lands, except as consented to and approved by the United States through the Secretary of the Interior of the United States.

5. Appropriating or sequestering the income from any business conducted upon said lands except as consented to and approved by the United States through the Secretary of the Interior of the United States.

6. Making any order herein, the effect of which would be to supersede the authority of the Secretary of the Interior of the United States, to determine what, if any, business ventures could be conducted upon said lands during the time title thereto is vested in the United States, or who may manage and control the same, or the effect of which would be to supersede, limit or impair present existing or future regulations of business activities upon such lands by the Secretary of the Interior of the United States.

7. Imposing, directly or indirectly, a judgment for costs, or attorney fees, or both, against property the title to which is vested in, or the supervision and control of which is exclusively entrusted to, the United States.

Said motion is made upon the following grounds:

1. That the United States has not submitted to the jurisdiction of this Court as to any of the foregoing matters; that this Court can obtain no jurisdiction over the United States as to such matters without its consent and that the United States is an indispensable party, as respondent to the petition and Order to Show Cause, in so far as they are directed to the foregoing matters.

2. That it is the established law of this case, by the final judgment of the Circuit Court of Appeals for the Ninth Circuit, that by consenting to the suit

to establish the rights of Lee Arenas to a trust patent to the lands involved in this proceeding, as provided in Title 25, Section 345, U.S.C., the United States has not consented to the imposition [16] of liability for costs or other expenses of litigation against it.

Said motion will be based upon the affidavit of Irl D. Brett, Esq. which is served herewith, together with the records and files in this proceeding and the statutory and case law applying thereto.

Dated: December 16th, 1947.

JAMES M. CARTER,

United States Attorney.

IRL D. BRETT,

Special Assistant to the Attorney General.

By /s/ IRL D. BRETT,

Attorneys for Defendant United States of America.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 16, 1947. [17]

[Title of District Court and Cause.]

AFFIDAVIT OF IRL D. BRETT

State of California,
County of Los Angeles—ss.

Irl D. Brett, being first duly sworn, says:

I am a Special Assistant to the Attorney General of the United States, Lands Division, Department

of Justice, assigned to the office of James M. Carter, United States Attorney, at Los Angeles, and in such capacity am charged with the handling of the special appearance of, and motion to dismiss by, the United States of America in the above numbered and entitled proceeding in respect to the Petition for Supplemental Decree and the Order to Show Cause based thereon, which Order is returnable before this court on December 16, 1947, at 10 o'clock a.m.

That it appears from the Petition, and particularly from paragraphs IV and XI thereof, that the property which is the subject matter of said Petition and Order to Show Cause consists of Lots 46 and 47 in Section 14, Township 4 South, Range 4 East, S.B.B. & M., and certain portions of Section 26, Township 4 South, Range 4 East, S.B.B. & M., together with the income from a business [19] operation (motor court) located on a portion thereof; that by a conveyance executed by Grover Cleveland, President of the United States of America, dated May 14, 1896, and recorded in the General Land Office at Washington, D. C. in Volume 21, pages 231 to 233, inclusive, all of Sections 14 and 26, Township 4 South, Range 4 East, S.B.B. & M. were declared to be held by the United States of America in trust for the sole use and benefit of the Agua Caliente Band or Village of Mission Indians; that a true and correct copy of said Trust Patent is annexed to this affidavit, marked Exhibit 1, and by such reference incorporated herein as if herein set out in full; that at all times subsequent to said date

and to and including the date of this affidavit, said lands have been owned by the United States of America and held subject to said Trust Patent.

That it appears from the Petition for Supplemental Decree that it is based upon the provisions of a reservation in the Judgment made by the Honorable J. F. T. O'Connor, one of the Judges of this court, dated and entered on May 14, 1945 in Civil Order Book 32 at page 581, and identified and designated as paragraph VIII, which reservation is repeated and set forth verbatim in the Order to Show Cause, commencing on page 1, line 18, and ending on page 2, line 3; that the records, files, pleadings, briefs, and decisions rendered in connection with this proceeding disclose that no prayer for such reserved jurisdiction appeared in the original Complaint; that the original Judgment was in favor of the United States and was a summary judgment determining that the plaintiff was not entitled to any relief as against the United States; that the Order and Decree of the United States Supreme Court did not include or refer to such reservation of jurisdiction nor to the remedy sought by the Petition and Order to Show Cause (322 U.S. 419); that the first time such jurisdiction was prayed for was in paragraph 3 of the prayer of the Third Amended Complaint, in which plaintiff prayed:

“3. That plaintiff have such other and further relief as justice and equity may require including the costs of this action.”

That the Answer by the United States to the Third Amended Complaint objected to and denied

every form of relief as sought by plaintiff and concluded with a request for dismissal with costs; that in Finding XLIV the Court found: [20]

“XLIV

“That plaintiff in this action is what is known as a restricted Indian and as such is without plenary power in his own right to contract for the payment of Court costs, attorneys’ fees and other expenses necessarily incurred in the prosecution of this litigation and the Court, not having as yet determined the issues that will arise in this behalf, finds that this is a proper cause within which to retain jurisdiction for the purpose of determining and disposing of all issues which may arise concerning said subject matter.”

And in general Conclusion of Law No. XVII, the Court concluded:

“That the several attorneys for the plaintiff in this action have incurred expenses of considerable magnitude and have performed valuable services for the plaintiff in this action; that the power of plaintiff to contract for the payment of such expenses and for such services is restricted by law; that the present cause is a proper one for the Court to retain jurisdiction of the subject matter thereof for the purpose of hearing and determining all issues that appertain to the determination of the amount of such expenses and the value of such services and for the payment and discharge thereof and for such

orders in connection therewith as the Court of equity may deem meet and proper.”

That said Finding and Conclusion were attacked by the United States, which sought to strike the same in a document dated June 9, 1945, filed June 11, 1945, and entitled “Motion to Vacate Judgment and Conclusions and to Amend Findings of Fact”; that said motion was overruled by the court and paragraph VIII of the Judgment was included therein, as hereinabove alleged; that upon appeal from said judgment on December 20, 1945, the United States filed its Statement of Points on Appeal and included therein as Point 8 the following, to-wit: [21]

“8. That the District Court erred in holding that appellee is restricted by law from contracting for the payment of legal services and that the Court retained jurisdiction over this action for the purpose of adjudicating the reasonable sum that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in this action and for expenses necessarily incurred by them in his behalf in the prosecution thereof.”

That affiant does not have available to him the briefs upon appeal in the Circuit Court of Appeals upon the second appeal, which was from the judgment in which this reservation of jurisdiction is contained; but in the decision of the Circuit Court in the case of *United States of America vs. Lee Arenas*, 158 F. (2d) 730, at page 753, the Circuit Court expressly refers to the objections by the United States to said reserved jurisdiction, and holds that such

reservation does not affect the United States because by consenting to this action under Title 25, Section 345, U.S.C.A., the United States has not consented to the imposition of liability for costs or other expenses as against it, and that there is "neither internal nor external evidence that the Judgment reflects any such indication"; that neither in the Petition for Writ of Certiorari filed by Lee Arenas, nor the Conditional Cross-Petition filed by the United States, was any issue raised, argued, or submitted with respect to the reserved jurisdiction as set forth in paragraph VIII of said Judgment.

/s/ IRL D. BRETT,

Affiant.

Subscribed and sworn to before me this 16th day of December, 1947.

[Seal]

EDMUND L. SMITH,

Clerk, United States District Court, Southern District of California. [22]

EXHIBIT NO. 1

United States of America

To all to whom these presents shall come, Greeting:

Whereas it is provided by an Act of Congress entitled "An Act for the relief of the Mission Indians of the State of California" approved January twelfth Anno Domini one thousand eight hundred and ninety one (26 Stats 712) that "the Secretary of the Interior shall appoint three disinterested persons as Commissioners to arrange a just and satis-

factory settlement of the Mission Indians residing in the State of California upon reservations which shall be secured to them.

“Section 2. That it shall be the duty of said Commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the Secretary of the Interior”.

“Section 3. That the Commissioners upon the completion of their duties shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the Commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented subject to the provisions of section 4 of this act, for the period of twenty-five years in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village discharged of said trust and free of all charges or incumbrance whatsoever.”

And Whereas it appears by a letter dated October

twenty-sixth, eighteen hundred and ninety-five from the Commissioner of Indian Affairs, and an order dated October twenty-eighth eighteen hundred and ninety-five from the Secretary of the Interior that a selection has been made by the Commissioners appointed [23] and acting under said act of Congress of January twelfth eighteen hundred and ninety one for the Agua Caliente band or village of Mission Indians covering sections twelve, fourteen, twenty-two, twenty-four, twenty-six and thirty-four of township four South, range four east, of the San Bernardino Meridian in the State of California containing three thousand eight hundred and forty four acres and eighty hundredths of an acre.

Now Know Ye, That the United States of America in consideration of the premises and in accordance with the provisions of the said Act of Congress approved January twelfth eighteen hundred and ninety-one, hereby declares that it does and will hold the said tracts of land selected as aforesaid (subject to all the restrictions and conditions contained in the said act of Congress of January 12, 1891) for the period of twenty-five years in trust for the sole use and benefit of the said Agua Caliente Band or Village of Mission Indians according to the laws of California and at the expiration of said period the United States will convey the same, or the remaining portion not patented to individuals, by patent to said Agua Caliente Band or Village of Mission Indians as aforesaid in fee simple discharged of said trust and free of all charge or incumbrance whatsoever.

Provided, That when patents are issued under the fifth section of said act of January twelfth, eighteen hundred and ninety-one in favor of individual Indians for lands covered by this patent they will override (to the extent of the land covered thereby) this patent, and will separate the individual allotment from the lands left in common, and there is reserved from the lands hereby held in trust for said Agua Caliente Band of Village of Mission Indians a right of way thereon, for ditches or canals, constructed by the authority of the United States.

In testimony whereof, I, Grover Cleveland, President of the United States of America have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed. [24]

Given under my hand at the City of Washington this fourteenth day of May in the year of our Lord one thousand eight hundred and ninety six and of the Independence of the United States the one hundred and twentieth.

By the President, GROVER CLEVELAND

[Seal]

By M. McKEAN, Secretary

L. Q. C. Lamar, Recorder of the General Land Office, Recorded Vol. 21 pp. 231 to 233 inclusive.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 16, 1947. [25]

[Title of District Court and Cause.]

ORDER DENYING DISMISSAL

The Petition for Supplemental Decree in the above entitled cause for Attorneys' fees and expenses advanced by Messrs. John W. Preston, Oliver O. Clark and David D. Sallee, attorneys for plaintiff Lee Arenas, came on to be heard on the 22nd day of December, 1947, upon the motion of the United States of America to dismiss said petition as to said defendant, filed by its said attorneys in said action, and the Court having heard the arguments of counsel for the United States and also for the Petitioners, and being fully advised in the premises, does hereby find that said motion to dismiss is not well taken and should be denied, without prejudice.

Wherefore, It Is Ordered, Adjudged and Decreed that said motion to dismiss be and the same is hereby denied without prejudice.

Done in Open Court Dec. 22, 1947.

/s/ WM. C. MATHES,
Judge.

Judgment entered Dec. 31, 1947.

Approved as to Form:

/s/ IRL D. BRETT,
For JAMES M. CARTER.
United States Attorney.

[Endorsed]: Filed Dec. 31, 1947. [27]

[Title of District Court and Cause.]

ANSWER TO PETITION AND ORDER TO
SHOW CAUSE IN RE SUPPLEMENTAL
DECREE FOR ATTORNEYS' FEES AND
EXPENSES ADVANCED FOR SALE OF
PROPERTY, AND FOR APPOINTMENT
OF RECEIVER.

Comes Now the United States of America, by direction of the Attorney General of the United States, and appearing specially in its own behalf, and appearing generally in its capacity as Guardian for plaintiff and respondent, Lee Arenas, and by virtue of its obligation to represent and defend said plaintiff and respondent, in answer to the petition of John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore filed on October 24, 1947, and the Order to Show Cause directed to plaintiff and respondent, Lee Arenas, dated October 24, 1947, and reserving the objections heretofore set forth in the special appearance of, and motions to dismiss by, the United States of America, heretofore served and filed on December 16, 1947, which motion was denied without prejudice by [28] an Order of this Court dated December 24, 1947, at page 630 of Judgments, denies and alleges as follows:

I.

Alleges that the United States, by reason of the helpless and dependent character of the Palm Springs Band of Mission Indians, is the guardian

of, and has the exclusive control of, their property, including the lands and premises described in paragraph IV of the petition, and, by virtue thereof, there is imposed upon it the duty to do whatever matter be necessary for their guidance, welfare, and protection, and, particularly, for the guidance, welfare, defense and protection of Lee Arenas in connection with the lands aforesaid.

II.

That, to grant that portion of the petition which seeks to impose a lien upon and to involuntarily alienate the title to such restricted property; to interfere with, control, or otherwise affect or direct the management and control thereof; to impose judicial control upon the supervision and control of said property in said Indian reservation by the Secretary of the Interior of the United States and appoint a Receiver for said restricted property, except with the consent and approval of the Secretary of the Interior, is a violation of the governmental rights of the United States. That Lee Arenas is a restricted Indian ward of the United States, and by virtue of the Acts of Congress the property in controversy is restricted so that no interest in the property may in any way be encumbered or alienated without the consent of the Secretary of the Interior or unless the restrictions against the alienation are removed by the Secretary of the Interior; that it is in the governmental interest of the United States to enforce the restrictions against alienation imposed by Congress.

III.

That these answering respondents deny the allegations contained in paragraph II of said petition, except that it is admitted that a written document entitled "Agreement", dated November 20, 1940, was signed by David D. Sallee, and appears to bear the signature of Lee Arenas; that Lee Arenas is aged and infirm and has stated that he does not recall signing such document; that upon such ground these answering respondents deny that he signed the same. In this connection these respondents affirmatively allege that such agreement if executed by Lee Arenas, was solely between David D. Sallee and Lee Arenas, and provided, by its express terms, *inter alia*: [30]

"That the Party of the First Part hereby contracts with, retains and employs the Party of the Second Part as attorney in the matters hereinafter mentioned, subject to the approval of the Commissioner of Indian Affairs, and the Secretary of the Interior, pursuant to Section 2103 of the Revised Statutes of the United States of America.

"It Is Agreed that the said attorney is hereby authorized to associate with him in said work hereunder such assistants, including attorneys, as he may select, provided that the Government of the United States shall not be liable for any expenses;

"It Is Further Understood that in event the Party of the Second part, or his associates who are actually associated in the litigation and investigation as aforesaid, shall advance any necessary expenses, they shall be reimbursed by the Party of the

First Part, from the property recovered, such actual expenses as are strictly necessary or proper in connection with the printing of briefs, court costs for proceedings and other similar matters, and to include such actual and necessary traveling expenses, clerical hire, stenographic expense, and the like as may be properly required for the prosecution of said case, or cases; provided that all such expenditures shall be itemized and verified by the Party of the Second Part, and shall be accompanied by proper vouchers, and shall be paid only upon the approval of the Secretary of the Interior, or an officer designated by him who shall certify the same.

“It Is Further Understood And Agreed by and between the parties to this Agreement, that in event of a misunderstanding as regards the manner in which the compensation to the Party of the Second Part from the Party of the First Part shall be paid; and Trust Patents or receipts have been issued, and in [31] that event the Party of the First Part shall thereupon make application for a removal of restrictions upon sufficient of the premises to be sold, and from the proceeds of said sale or sales to pay said Party of the Second Part; that in event it is not for the best interests of the parties hereto to sell said land, the removal of restrictions shall be applied for upon properties coming to the First Party, as selected by said Second Party, upon the basis of one-tenth of the property—That is to say, Second Party shall select one property that does not exceed ten per cent of the total value of all properties, and that First Party shall select nine prop-

erties that do not exceed ninety per cent of the total value of said properties, and continue to make such selections until all property shall have been selected. That the property selected by the Second Party shall then be deeded to said Second Party, subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs.

“And It Is Further Understood and agreed that no assignment of this contract, or any interest therein, shall be made without the consent previously obtained from the Commissioner of Indian Affairs, and the Secretary of the Interior, and that such assignment if made must comply with Section 2106 of the Revised Statutes of the United States.”

That although such agreement was tendered to the Commissioner of Indian Affairs and the Secretary of the Interior, it was not approved and, to the contrary, was expressly disapproved.

These respondents further allege in respect to said alleged agreement of November 20, 1940, that none of the conditions precedent heretofore quoted therefrom in this paragraph have been complied with by petitioners.

Further answering paragraph II of said Petition, these respondents deny that a new contract was entered into on February 1, 1945, [32] between Lee Arenas and these petitioners which superseded the alleged agreement of November 20, 1940. In this connection these respondents allege that if any such agreement was entered into on February 1, 1945, it was wholly prospective and contains no provision

whatsoever with respect to the alleged agreement of November 20, 1940.

These respondents admit that a document dated February 1, 1945, which Lee Arenas now states he has no recollection of executing, does contain the clause which is quoted and set forth in paragraph II of the petition on page 2, lines 14 to 18, inclusive; but further allege that said text is immediately followed, limited, and conditioned by the following sentence, to-wit:

“All to be subject to the rules and regulations of the Department of the Interior”;

that, if such agreement dated February 1, 1945, was made and is in effect, the conditions precedent, to-wit, that such agreement was to be subject to the rules and regulations of the Department of the Interior, have not been fulfilled, met, or tendered by petitioners.

Further answering paragraph II of said Petition, these respondents allege that at and prior to the time that the purported agreement dated February 1, 1945, was signed by respondent Lee Arenas, petitioners were obligated and bound by a firm contract, to-wit, the contract dated November 20, 1940, as follows:

“And it is also understood and agreed that the said attorney at law, (David D. Sallee), and his associates, if any, shall pursue the litigation in question to and through the court of final resort, unless authorized by the Secretary of the

Interior to terminate the proceedings at an intermediate stage thereof.”

That no such authorization was requested or obtained from the Secretary of the Interior; that the circumstances of this litigation were such that at the date when the agreement of November 20, 1940 was executed, and at all times thereafter, to and including February 1, 1945, these petitioners [33] and each of them then knew that the remedy then sought by respondent Lee Arenas and to perform which petitioner David D. Sallee had obligated himself, and his associates, would, of necessity, require a petition for certiorari in the Supreme Court of the United States, preparation of the necessary briefs and presentation of the necessary argument in support thereof and in support of an appeal in said Court if certiorari were granted, together with the prosecution through a court of final resort following the decision of the Supreme Court if such decision were favorable to respondent Lee Arenas and resulted in a reversal of the decision theretofore made in the so-called St. Marie case. That it was represented to respondent Lee Arenas, that said contract of November 20, 1940, did not include the obligations aforesaid and that the performance of services following the decision of the United States Circuit Court of Appeals after the first judgment in this proceeding, was an additional service which would justify and require additional compensation and, also, that at the time of the negotiation leading up to the execution of the document dated February 1, 1945, respondent Lee Arenas, was aged and infirm,

was then being represented as counsel by these petitioners and each of them, and did not have or receive independent legal advice as to the terms, provisions and obligations of the agreement dated November 20, 1940, particularly that said agreement specifically covered and provided for the compensation to be received by said attorney for pursuing the litigation through the court of final resort. That by reason of the aforesaid the agreement contained in the document dated February 1, 1945, is null and void.

IV.

Answering paragraph VI of the said petition, these respondents allege that the period of restriction on alienation is subject to extension annually by the President of the United States, for a period not to exceed twenty-five (25) years, and that each President of the United States, since the effective date of the act, has extended such period of restriction on alienation annually for an additional period of twenty-five [34] (25) years. That such authority is vested in the President under the provisions of Title 25, Section 391, U.S.C.

V.

Respondents deny the allegations contained in paragraph VII of said petition and allege that by reason of the restrictions upon alienation, and the limited right of user under existing laws, and the uncertainty as to when, if at all, the lands described in paragraph IV of the petition will ever be released from such restrictions, said lands have a value which is problematical and highly specula-

tive, the exact amount of which is not now known to respondents.

That, as to the rentals, by reason of existing laws and restrictions upon the use of the premises and upon the character of permit which can be granted in respect of such use, the rentals now being procured are the full amount that could be produced therefrom and the production of any increased rental or income must necessarily await the change or modification of such existing laws and restrictions upon the use thereof. That the time when such change or modification will be made and the nature and extent thereof and the effect thereof upon the possibilities for an increase of income from said restricted lands is, at this time, wholly conjectural and speculative.

VI.

Answering paragraph VIII, respondents have no information or belief respecting the allegations contained in paragraph VIII of the petition, and upon such ground deny the same.

Respondents further allege that if said amount has been expended by petitioners and has not been repaid, petitioners have not furnished proper items, vouchers, and verified and submitted them to the Secretary of the Interior or to any officer designated by him, for his approval and certification.

VII.

Answering paragraph X of the petition, these respondents deny the allegations contained therein.

VIII.

Answering paragraph XI, these respondents deny that portion thereof which alleges that the annual income could be increased in the hands of a competent manager; and further allege that this Court has no jurisdiction or control over the operation and management of such restricted property, but that the exclusive jurisdiction, control and management thereof is vested by Congress in the United States.

Respondents further deny that any portion of petitioners' compensation may be paid from the proceeds of a sale of said property or from a portion of the income derived therefrom except and until the restrictions now existing upon the alienation thereof have been removed, and that this Court does not have jurisdiction to order or require a sale or other alienation of, or the encumbrance of, said restricted real estate or the income derived therefrom.

IX.

Answering paragraphs XII, XIII, and XIV, respondents deny each and every allegation therein; but respondents admit that petitioners have performed valuable services for Lee Arenas and are entitled to recover a money judgment against him to the extent of ten per cent (10%) of the amount of the reasonable value of the restricted lands described in paragraph IV of the petition as of the date of the completion of this litigation when, but only when, they have completed and fulfilled such agreements, if any, as they may have made with him, including all conditions precedent, as therein provided; that they are not entitled, and this Court

has no jurisdiction to enter an order, judgment, or decree in their favor by which the lands described in paragraph IV of said petition, and the income derived therefrom, are alienated, transferred or encumbered, or by which order, judgment, or decree said lands or income is taken [36] from or placed beyond the exclusive management, operation and control of the United States of America by and through the Secretary of the Interior.

Wherefore, respondents pray:

1. That this Court find and determine that the Petition and Order to Show Cause are premature, in that petitioners have not fully performed and complied with the conditions precedent of their employment, and have not completed the work to be done by them, and that said Order to Show Cause be discharged;

2. That, if it be held that petitioners are entitled to any relief, such relief be limited to the Contract fee fixed in the agreement dated November 20, 1940, fixed in money and as a personal money judgment against respondent Lee Arenas only;

3. That, if it be determined that the agreement dated November 20, 1940, has been superseded by the agreement dated February 1, 1945, that the amount and value of the property described in paragraph IV of the Petition be fixed and determined as of February 10, 1948, or such other date as the Court shall determine as the date when petitioners shall have fully completed the obligations on their part to be performed, fixed in money and as a personal money judgment against respondent Lee Arenas only;

4. That it be ordered and decreed that petitioners are not entitled to affix a lien upon, or to an order for the disposition, alienation or sale of the restricted real property or the income derived therefrom and are not entitled to the appointment of a receiver or other ancillary relief as against said restricted property;

5. That the issues as to the value of the interest of Lee Arenas in the restricted property, be tried to a jury;

6. If the Court shall hold and determine that petitioners are to be paid on a different basis than the contract fee as provided in the agreement of November 20, 1940, that the reasonable value of the services of petitioners performed for respondent Lee Arenas in this proceeding, [37] be tried to a jury.

Dated: February 9th, 1948.

JAMES M. CARTER,
United States Attorney,
IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By **IRL D. BRETT,**
Attorneys for Respondents,
United States of America,
and Lee Arenas. [38]

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 9, 1948.

[Title of District Court and Cause.]

MOTION TO STRIKE CERTAIN TESTIMONY
OF WITNESSES JOSEPH A. GALLAGHER,
SR., and BENTON BECKLEY

Come Now respondents, Lee Arenas and United States of America, and move this honorable court to strike the opinions as to market value of the real properties which are the subject matter of this proceeding, as expressed and testified to under oath herein by the witnesses, Joseph A. Gallagher, Sr. and Benton Beckley. This motion is not directed to the other evidence and testimony of said witnesses but is solely directed to the opinions expressed by them, either orally or in writing, as to the fair market value of said lands.

Said motion is made upon the ground that both of said witnesses have inextricably included within the matters upon which they based their said opinions, certain matters which were wholly incompetent and inadmissible for such purpose, to-wit:

1. The use of the assessed value as evidence of market value;
2. The use of the assessed value of the land [40] and improvements indiscriminately as evidence of market value;
3. The use of an artificial mathematical calculation (multiplying assessed value by 5) as evidence of market value;
4. The total ignoring of zoning restrictions which, by law, would prevent the use of the subject

properties for business purposes, by assuming as an integral part of their basis for their opinions as to market value, alleged comparable properties which were zoned for business;

5. That in arriving at said opinions as to market value each of said witnesses fixed such value upon the basis of an adaptability for use for which said properties were not then available and which use was then prohibited by law.

Said motion will be based upon the records and files in this proceeding.

Dated: February 20, 1948.

JAMES M. CARTER,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Respondents.

Points and Authorities in Support of
Motion to Strike

1. Assessed value is incompetent as evidence of market value.

San Jose etc. R.R. vs. Mayne, 83 Cal. 566, 570;
23 Pac. 522, 523

Yolo Water etc. vs. Edmands, 50 Cal. App. 444,
450; 195 Pac. 463, 466

2. Market value must be determined by consideration only of the uses for which the land "is adapted and for which it is available" and may not

be based upon the assumption of what it would be worth if present existing conditions were changed.

Long Beach, etc. vs. Stewart, 30 A.C. 767, 771-772, 185 Pac. (2) 585, 587-588

3. The opinion of an expert witness as to market value should be stricken where it is based entirely upon incompetent and inadmissible matters or such matters are the chief elements in the calculations which lead him to such conclusions.

San Diego, etc. vs. Neale, 88 Cal. 50, 62; 25 Pac. 977, 980

Reclamation Dist. No. 730 vs. Inglin, 31 Cal. App. 495, 500; 160 Pac. 1098, 1101

Temescal Water Co. vs. Marvin, 121 Cal. App. 512, 522; 9 Pac. (2) 335, 339 [42]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

I.

Assessed value is incompetent as evidence of market value.

“The court allowed the plaintiff, against the objections of the defendant, that the same were incompetent and irrelevant, to introduce in evidence certain statements signed by the defendant for the years 1884, 1885 and 1886. * * * The statements were evidently those required under Sections 3629 to 3633 of the Political Code. Nowhere in them, or in any other sections of that Code which have been called to our attention, is there any provision which

requires the person whose property is to be assessed, to fix the value thereof. The record here shows that such fixing of value, if made, was by the assessor, and not by the defendant. We cannot, therefore, perceive what relevancy the statements had to the question of the value of the land to be taken. They were not, in any way, declarations by the defendant as to the value of his land, and even if they have the same force and effect as an assessment roll made by the proper officer, they are inadmissible. The assessment of property for taxation being made for another purpose, and not at the instance of either party, and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings.”

San Jose etc. R.R. vs. Mayne, 83 Cal. 566, 570;
23 Pac. 522, 523. [43]

“The valuation placed upon the property by the assessor is not evidence of market value.”

Yolo Water etc. vs. Edmands, 50 Cal. App. 444,
450; 195 Pac. 463, 466.

II.

Market value must be determined by consideration only of the uses for which the land “is adapted and for which it is available” and may not be based upon the assumption of what it would be worth if present existing conditions were changed.

[P. 770]: “Appellant first claims that there was error in the instructions given to the jury. He says: ‘We can state briefly that the error was in the in-

roduction of the idea of availability as a basis for values.' In other words, appellant claims that in fixing the market value of the land, adaptability for any use should be considered by the jury, but that availability should not. Such obviously is not the law, for the jury should consider whether the land is or is not available for particular uses under existing zoning ordinances, as such availability does affect market value."

[P. 771]: "In *Central Pacific Railroad Co. vs. Pearson*, 35 Cal. 247, this court gave consideration to the matter of 'availability' when it was insisted that the value of certain land was enhanced by reason of potential wharf privileges. The court said at page 262: 'The testimony in relation to the value of wharf privileges on the shore of the Sacramento river, where the tide ebbs and flows, given for the purpose of enhancing the value of some of the land sought to be appropriated, was also improperly received, for the obvious reason that the party claiming the compensation had no wharf franchise. The mere fact that the party might at some future time obtain from the State a grant of a wharf franchise if allowed to remain the owner of the land, is altogether too remote and speculative to be taken into consideration. The question for the Commissioners to ascertain and settle was the present value of the land in its then condition, and not what it would be worth if something more should be annexed to it at some future time. (*Gould vs. The Hudson River Railroad Company*, 6 N.Y. 522)'"

[P. 772]: "The underlying principles upon which

the authorities are based are summarized in Nichols on Eminent Domain, second edition, volume 1, as follows: ‘* * * the compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted and for which it is available.’ ”

[P. 774]: “Furthermore, in the present case, unlike the situation presented in the first Beverly Hills case (110 Cal. App. 626), there is nothing whatever in the record tending to show any ‘reasonable probability that the prohibition or restriction will be modified or removed in the near future.’ Neither industry nor business has been [44] invading the residential development in the involved area. The zoning ordinance classifying the property as residential was enacted only three years before the condemnation proceedings were started, and it clearly appears that the ordinance is in line with the natural development in such area. Nor is there the slightest suggestion that the ordinance was enacted for the purpose of defeating appellant in his just claims for compensation or that it was not enacted in the utmost good faith. In the words of the second Beverly Hills case (127 Cal. App. 223, 231), it would be ‘speculative to assume that a change in the provisions of the zoning ordinance is likely to occur.’ ”

Long Beach, etc. vs. Stewart, 30 A.C. 767, 771-772; 185 Pac. (2) 585, 587-588.

III.

The opinion of an expert witness as to market value should be stricken where it is based entirely

upon incompetent and inadmissible matters or such matters are the chief elements in the calculations which lead him to such conclusions.

“Appellants contend that the court did not err in refusing to strike out the testimony objected to, because the witnesses were competent to express an opinion as to value, and the reasons for such opinion can only affect the weight to be given to their testimony; but we think that where a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions, it should be rejected altogether.”

San Diego, etc. vs. Neale, 88 Cal. 50, 62; 25 Pac. 977, 980.

“* * * It follows, of course, that the court not only erred in allowing the question of sales of other lands and the prices paid for such lands to be gone into on the redirect examination of the witness, Kendall, but erred in refusing to grant the motion to strike out the testimony of said witness, it having been made clearly to appear from said testimony that the witness had based his opinion upon the question of value wholly upon incompetent matters. (San Diego Land etc. Co. vs. Neale, 88 Cal. 50, 63, [11 L.R.A. 604, 25 Pac. 977]; Pierson vs. Boston Elevated Ry., 191 Mass. 223, 233, 234, [77 N. E. 769].)”

Reclamation Dist. No. 730 vs. Inglin, 31 Cal. App. 495, 500; 160 Pac. 1098, 1101. [45]

“In *City of Stockton vs. Ellingwood*, supra, it is said: ‘The different elements considered by the witnesses, in giving their opinions as to market value may be inquired into on cross-examination, and if, upon such cross-examination, it appears to the court that the witness’ testimony is based upon improper consideration, or upon what is usually termed as speculative only, it should be stricken from the record or withdrawn from the consideration of the court or the jury.’

“Since, therefore, the opinion of the witness Hawgood as to the market value of the land sought to be condemned was based upon a consideration of the land as part of a completed project involving as it did the use of the land sought in conjunction with land of the respondent and with other land separate from the lands of appellants and respondents, a consideration, which we believe was improper, the action of the trial court in striking such an opinion from the record was proper.”

Temescal Water Co. vs. Marvin, 121 Cal. App. 512, 522; 9 Pac. (2) 335, 339. [46]

[Endorsed]: Filed Feb. 20, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered that John W. Preston, Oliver O. Clark and David D. Sallee, heretofore regularly petitioned the above entitled Court that a supple-

mental decree be made and entered herein, which should determine the amount of their reasonable compensation for services rendered to the plaintiff herein, and the amount of costs and expenses paid by said petitioners on behalf of the plaintiff herein, and for which reimbursement has not been made, and fixing the time for the payment thereof, and the manner of such payment, and the security thereof, and for appropriate ancillary relief in respect thereof, and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein, of the time and place of such hearing, before the above entitled Court, Honorable W. C. Mathes, judge thereof presiding, in the courtroom of said Court in the United States Post Office [47] Building at the northeast corner of Temple and Spring Streets, in the City of Los Angeles, County of Los Angeles, State of California, and on the 12th and 20th of February, 1948, and the 8, 29, 30 and 31st days of March, 1948;

And Be It Further Remembered that upon said hearing the Petitioners appeared personally and upon their own behalf; the United States of America appeared specially by Irl D. Brett, as Special Assistant to the Attorney General, Lands Division, Department of Justice of the United States of America, and Lee Arenas, the plaintiff herein appeared personally, and by said Irl D. Brett as such Special Assistant to the Attorney General, and by John J. Tahaney, an Attorney at Law and Solicitor;

Whereupon evidence, both oral and documentary,

was offered and received, and the cause was argued and submitted to the Court for decision, and

Now, Therefore, the Court being fully advised in the premises, makes these its findings of fact and conclusions of law herein, to wit:

FINDINGS OF FACT

I.

That Petitioners, Oliver O. Clark and David D. Sallee, were originally employed by plaintiff, Lee Arenas, as evidenced by a contract in writing of date November 20th, 1940, in evidence here as Petitioners' Exhibit No. 6, to represent him in all matters respecting an allotment of lands to him in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, in Riverside County, California.

II.

That said contract remained in force until about September 7th, 1943, at which time it was orally agreed between plaintiff [48] and said petitioners that said John W. Preston would be associated with said Oliver O. Clark and David D. Sallee in the performance thereafter of the duties undertaken by said Oliver O. Clark and David D. Sallee on behalf of plaintiff, as aforesaid, and that said petitioners should be compensated upon a quantum meruit basis for their said services, and should be reimbursed for all expenses incurred by them in behalf of plaintiff and members of his family. That said agreement is evidenced by a writing, which is petitioners' Exhibit Number 7 herein, and which was executed on or

about February 1st, 1945, and continued in force thereafter.

III.

That said petitioners, prior to the filing of their petition herein, fully performed, and completed, the duties of their said employment.

IV.

That each of the allegations contained in Paragraphs I, III, IV, V, VI, VIII, IX and X of the petition herein is true.

V.

That the lands allotted to said Lee Arenas, as aforesaid, and said Lee Arenas, are entitled to receive for domestic, agricultural and horticultural uses upon said lands, water from Tahquitz and Andreas Canyons in the mountains above said lands, proportionately with all other members of said Mission Band of Indians in respect of the land within said Indian reservation, and that the water available from said sources, for said purposes, is reasonably adequate therefor.

VI.

That the reasonable market value of said lands allotted [49] to said Lee Arenas, as aforesaid, and of said water rights, is uncertain, but, nevertheless, is very substantial.

VII.

That the petitioners Oliver O. Clark and David D. Sallee rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above entitled

cause for which said petitioners are entitled to receive as compensation the reasonable value thereof; which reasonable value was and is ten per cent (10%) of the value of the lands allotted to Lee Arenas and Guadalupe Arenas under the allotment proceedings of 1927, and of said water rights incident to said lands, being the same lands described in Paragraph IV of the Petition filed by the petitioners herein as follows:

“Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $E\frac{1}{2}$ $SW\frac{1}{4}$ $NW\frac{1}{4}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$ and $SW\frac{1}{4}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.

“Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $SE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.” [50]

VIII.

That the petitioner John W. Preston rendered

and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above entitled cause for which said petitioner is entitled to received as compensation the reasonable value thereof; which reasonable value was and is twelve and one-half per cent ($12\frac{1}{2}\%$) of the value of the lands allotted to Lee Arenas and Guadalupe Arenas under the allotment proceedings of 1927, and of said water rights incident to said lands, being the same lands described in Paragraph IV of the Petition herein and in Paragraph VII of these Findings; and that said petitioner John W. Preston has advanced and paid out for said plaintiff, as necessary costs and expenses of said action sums aggregating Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) for which said petitioner is entitled to reimbursement from said plaintiff.

IX.

That no part of the compensation, costs and expenses mentioned and described in Paragraphs VII and VIII of these Findings has been paid, and all thereof is now due and unpaid.

X.

That it is reasonable and equitable that until the compensation, costs and expenses due from the plaintiff to the petitioners, as described and set forth in Paragraphs VII and VIII of these Findings, are fully paid that petitioners be secured by an equitable lien upon the whole of the allotted lands and the water rights incident thereto and upon

twenty-two and one-half per cent (22½%) of the income therefrom in excess of the reasonable and necessary cost of operating said properties.

XI.

That it is reasonable and equitable that the plaintiff be [51] allowed, and have, a period of three months from and after the entry of judgment and decree herein within which to satisfy and discharge the equitable lien upon said allotted lands and the water rights incident thereto and upon that portion of the income therefrom, provided and set forth in Paragraph X of these Findings, and that any and all further proceedings by the petitioners for the enforcement and satisfaction of said equitable lien be stayed for a period of three months from and after the entry of judgment and decree herein.

From the foregoing facts, the Court concludes:

CONCLUSIONS OF LAW

I.

That the petitioners Oliver O. Clark and David D. Sallee are entitled to receive as compensation for their services to the plaintiff in the above entitled action ten per cent (10%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927 and of the water rights incident thereto, and to a judgment therefor.

II.

That the petitioner John W. Preston is entitled to receive as compensation for his services to the

plaintiff in the above entitled action twelve and one-half per cent ($12\frac{1}{2}\%$) of the value of the lands allotted to Lee Arenas and Guadalupe Arenas under the allotment proceedings of 1927 and of the water rights incident thereto, and said petitioner is also entitled to reimbursement from the plaintiff the sum of Two Hundred Fifty-eight and $\frac{67}{100}$ Dollars advanced by said petitioner as costs and expenses of suit, and to a judgment therefor.

III.

That the petitioners are entitled to an immediate, equitable [52] lien, to secure the payment of said compensation and to secure payment of the amount of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars (\$258.67), paid by the Petitioner John W. Preston for the use and benefit of said plaintiff, upon the allotments made to Lee Arenas and Guadalupe Arenas under the allotment proceeding of 1927 and upon all rights conferred by said allotments, and upon the entire interest and estate of Lee Arenas and his heirs in the lands embraced within said allotments, and upon the entire interest in said lands in the hands of the United States of America, and upon twenty-two and one-half per cent ($22\frac{1}{2}\%$) of the income therefrom in excess of the reasonable and necessary operating expenses of said property until said compensation and said sum of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars (\$258.67), shall be fully paid and satisfied.

IV.

That the Petitioner John W. Perston is entitled to judgment against the plaintiff for the sum of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars (\$258.67) heretofore advanced by said Petitioners for the use and benefit of said plaintiff, and is entitled to an equitable lien to secure the payment thereof upon the lands allotted to the plaintiff and upon the income therefrom until said judgment is fully paid.

V.

That the plaintiff is entitled to, and shall be allowed, a period of three months from and after the entry of judgment and decree herein within which to satisfy and discharge the equitable lien allowed and granted to the petitioners, as provided and set forth in Paragraphs III and IV of these Conclusions of Law, and that any and all further proceedings by the petitioners for the enforcement and satisfaction of said equitable lien be stayed for a period of three months from and after the entry of judgment and decree herein. [53]

VI.

That it is proper that the Court should retain jurisdiction over this action, and the parties thereto, and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method whereby, the payment of all or any part of the compensation and reimbursement for expenses hereby awarded shall be made or

further secured; and in order to require and compel the satisfaction and discharge, or enforcement, of the equitable lien awarded to the petitioners; and if necessary, for the determination of the money value of the legal services rendered and performed by the petitioners for and on behalf of the plaintiff in this action; and for the appointment of a Receiver or Commissioner to effectuate the judgment and decree herein, in accordance with the equitable jurisdiction, practice and procedure of this Court.

VII.

That the parties to this proceeding should pay their own costs, respectively, incurred herein.

Let judgment be entered accordingly.

Dated this 30th day of April, 1948.

/s/ WM. C. MATHES,
Judge.

Approved as to form as provided by local rule 7,
April 30, 1948.

/s/ IRL D. BRETT,
Special Assistant to the Attorney General.

Acknowledgment of Service attached.

[Endorsed]: Filed May 3, 1948.

[54]

In the District Court of the United States, Southern
District of California, Central Division

No. 1321 O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

Be It Remembered that John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore regularly petitioned the above entitled Court that a supplemental decree be made and entered herein, which should determine the amount of their reasonable compensation for services rendered to the plaintiff herein, and the amount of costs and expenses paid by said petitioners on behalf of the plaintiff herein, and for which reimbursement has not been made, and fixing the time for the payment thereof, and the manner of such payment, and the security thereof, and for appropriate ancillary relief in respect thereof, and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein, of the time and place of such hearing, before the above entitled Court, Honorable W. C. Mathes, judge thereof presiding, in the

courtroom of said Court in the United States Post Office Building at the northeast corner of Temple and Spring [56] Streets, in the City of Los Angeles, County of Los Angeles, State of California, on the 12th and 20th days of February, 1948, and the 8, 29, 30, and 31st days of March, 1948;

And Be It Further Remembered that upon said hearing the petitioners appeared personally and upon their own behalf; the United States of America appeared specially by Irl D. Brett as Special Assistant to the Attorney General, Lands Division, Department of Justice of the United States of America, and Lee Arenas, the plaintiff herein, appeared personally, and by said Irl D. Brett as such Special Assistant to the Attorney General, and by John J. Tahaney, as Attorney at Law and Solicitor;

Whereupon evidence both oral and documentary, was offered and received, and the cause was argued and submitted to the Court for decision, and the Court having made and filed its findings of fact and conclusions of law herein and ordered judgment in accordance therewith.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

First: That the petitioner John W. Preston, have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioner for and on behalf of said plaintiff in the above entitled action, twelve and one-half per cent (12½%) of the value of the lands allotted to

Lee Arenas and Guadalupe Arenas under the allotment proceedings of 1927 and of the water rights incident to said lands, the same being more particularly described as follows, to wit:

“Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres; [57]

Parcel (C) Desert: $E\frac{1}{2}$ $SW\frac{1}{4}$ $NW\frac{1}{4}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$ and $SW\frac{1}{4}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.

“Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.B.&M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising five (5) acres;

Parcel (C) Desert: $SE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.B.&M., comprising forty (40) acres.”

Second: That said petitioner John W. Preston have and recover from the plaintiff, Lee Arenas, the sum of Two Hundred Fifty-eight and 67/100 Dol-

lars (\$258.67) heretofore paid by said petitioner for the use and benefit of said plaintiff in said action.

Third: That the petitioners Oliver O. Clark and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff in said action, ten per cent (10%) of the value of said allotted lands and of the water rights incident thereto.

Fourth: That the payment of the compensation awarded hereby to said petitioners John W. Preston, Oliver O. Clark and David D. Sallee, and the payment of said sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) heretofore paid by said petitioner John W. Preston for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the allotments made to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927 and upon all rights conferred by said allotments; and upon the entire interest and estate of Lee [58] Arenas and his heirs in the lands embraced within said allotments, being the lands described above in paragraph "First"; and upon the entire interest in said lands in the hands of the United States of America; and upon twenty-two and one-half per cent (22½%) of the income therefrom in excess of the reasonable operating expenses of said property; and said equitable lien shall be and continue in full force and effect until the compensation herein and hereby awarded to said petitioners, respectively, and said

sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) paid by said petitioner John W. Preston for the use and benefit of said plaintiff, shall be fully paid and satisfied.

Fifth: That the plaintiff be, and he hereby is, allowed and granted a period of three months from and after the entry of this judgment within which to satisfy and discharge the equitable lien herein and hereby allowed and granted to the petitioners, and any and all further proceedings by the petitioners for the enforcement of said lien be and the same are stayed for said period of three months from and after the entry of judgment and decree herein.

Sixth: The Court hereby retains jurisdiction over this action, and the parties thereto, and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method, or methods whereby the payment of all or any part of the compensation and reimbursement for expenses hereby awarded to the petitioners shall be made or further secured; and in order to require and compel the satisfaction and discharge, or the enforcement of the equitable lien herein and hereby awarded to said petitioners; and if necessary, for the determination by the Court of the money value of the legal services rendered and performed by the petitioners for and on behalf of the plaintiff in this

action; and for the appointment of a Receiver or Commissioner to effectuate the judgment and decree herein, in [59] accordance with the equitable jurisdiction, practice and procedure of this Court.

Seventh: That the parties to this proceeding pay their own costs, respectively, incurred therein.

Dated this 30 day of April, 1948.

/s/ WM. C. MATHES,
Judge.

Approved as to form as provided by local rule 7.
April 30th, 1948.

/s/ IRL D. BRETT,
Special Assistant to the
Attorney General.

Judgment enter May 3, 1948.

Acknowledgement of Service attached.

[Endorsed]: Filed May 3, 1948. [60]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America and Lee Arenas hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment made and en-

tered herein on May 3, 1948, in C.O. Book 50 at page 488, in favor of John W. Preston, Oliver O. Clark and David D. Sallee, and from the whole thereof.

Dated: June 30, 1948.

JAMES M. CARTER,
United States Attorney,

IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for Appellants, United States of America
and Lee Arenas. [62]

Acknowledgment of Service attached.

[Endorsed]: Filed June 30, 1948.

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF TESTIMONY OF JOSEPH A. GALLAGHER, SR.

Come Now respondents Lee Arenas and United States of America and move this Honorable Court to strike the opinions as to the market value in fee of the real properties which are the subject matter of this proceeding, as expressed and testified to under oath herein by the witness, Joseph A. Gallagher, Sr., and as set forth in petitioners' Exhibit No. 14.

This motion is not directed to the other evidence and testimony of said witness but is solely directed to the opinions expressed by him, either orally or in writing, as to the fair market value of the fee simple title to said lands.

Said motion is made upon the following grounds:

1. That the market value of the fee simple title to such lands is immaterial to any issue involved in this hearing.

2. That the market value of the fee simple title to such lands is irrelevant to any issue involved in this hearing.

3. That evidence of the market value of the fee simple [63] title to such lands is incompetent in this proceeding.

4. That said witness has inextricably included within the considerations upon which he based his such opinions of the market value of the fee simple title to such lands, certain matters which were wholly incompetent and inadmissible and, by reason thereof, the opinion expressed are incompetent and inadmissible; such matters being:

- (a) The use of the assessed value of unimproved lands as evidence of market value;

- (b) The use of the assessed value of land and improvements indiscriminately as evidence of market value;

- (c) The use of an artificial mathematical calculation (multiplying assessed value by 5 and com-

puting the value of the four surrounding sections and dividing by 4) as evidence of market value;

(d) The use of the retail value of subdivided lots as the measure of the value of unsubdivided acreage;

(e) The assumption, as an integral part of his basis for his opinions as to market value, of a change in existing conditions and the fixing of the value as if such changes had taken place and in the then changed condition.

Such motion will be made upon the records and files in this proceeding, the reporter's transcripts of the proceeding and the Points and Authorities hereto annexed.

Dated: February 14, 1951.

ERNEST A. TOLIN,
United States Attorney,

IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for Respondents [64]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 16, 1951.

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 16th day of February in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Wm. C. Mathes, District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing oral argument on attorneys' fees after Mandate of Court of Appeals, Ninth Circuit; John W. Preston, Oliver O. Clark, David D. Sallee, Esqs., appearing as counsel for petitioners on question of attorneys' fees; John M. Ennis, Esq., appearing as counsel for plaintiff Lee Arenas, who is present; Irl D. Brett, Spec. Ass't to Att'y Gen'l, appearing as counsel for Gov't;

Filed motion of defendant to strike portion of testimony of Joseph A. Gallagher.

At 10:08 a.m. Attorney Preston argues for petitioners. Ex. S, a map, produced by petitioners, is admitted in evidence.

At 10:15 a.m. Attorney Brett argues for defendant U.S.A. and plaintiff Lee Arenas, and presents motion to strike portion of testimony of witness Joseph A. Gallagher, Sr. Court denies said motion. Court recesses.

At 11:10 a.m. court reconvenes herein and all being present as before, including counsel for both sides; Attorney Brett argues further; Attorney Ennis argues for plaintiff Lee Arenas.

Attorney Clark argues for petitioners. Court fixes fees of attorneys at \$90,000, and orders that they have lien therefor, and fixes three months in which to discharge equitable lien for amount awarded.

All provisions for enforcement of liens stayed six months. Court reserves jurisdiction. Petitioners to draw findings and judgment in five days pursuant to Local Rule 7.

Attorney Brett requests that the Court rule further.

Court makes its ruling on the Indians' interest.

[75]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be it remembered that John W. Preston, Oliver O. Clark, and David D. Sallee heretofore regularly filed their petition in the above-entitled cause praying that the court make and enter a supplemental decree herein which should determine the amount of the compensation for services rendered by them to the plaintiff herein and the amount of costs and expenses paid by said petitioners on behalf of said plaintiff for which reimbursement has not been made by plaintiff, and fixing the time for the payment thereof and the manner of such payment and

the security thereof, and for appropriate ancillary relief in respect thereof; and that said petition came on regularly for hearing, after proper notice to all persons interested therein of the time and place of said hearing, before the above-entitled court, Honorable William C. Mathes, a Judge thereof, presiding, in the courtroom of said court in the United States Post Office Building at the northeast corner of Temple and North Spring Streets, in the City of Los Angeles, State of California, on the 7th and 16th days of February, 1951; [76]

Be it further remembered that upon said hearing the petitioners appeared personally and in their own behalf; the United States of America appeared by Ernest A. Tolin, Esq., United States Attorney, and Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, Department of Justice; and the plaintiff herein appeared personally and by John M. Ennis, Esq., as his personal attorney, and by the said Ernest A. Tolin, Esq., and Irl D. Brett, Esq., in their official capacities;

Whereupon, in accordance with the decision of the United States Court of Appeals for the Ninth Circuit, reported in *Arenas vs. Preston, et al.*, 181 F.2d 62, and the mandate issued pursuant to the judgment of said court in said cause, evidence, both oral and documentary, was offered and received, and the cause was submitted to the court for decision upon argument and briefs of respective counsel; and the court being fully advised in the premises, the following findings of fact and conclusions of law constituting the decision of the court in said pro-

ceeding for a supplemental decree, as aforesaid, are hereby made, to wit:

FINDINGS OF FACT

I.

That on or about the 20th day of November, 1940, the plaintiff, Lee Arenas, by an instrument in writing, employed petitioners Oliver O. Clark and David D. Sallee to represent him in all matters respecting an allotment of lands in severalty to him in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, in Riverside County, State of California.

II.

That on or about the 7th day of September, 1943, petitioner John W. Preston was likewise employed by the plaintiff, Lee Arenas.

III.

That said petitioners, prior to the filing of their [77] petition herein, fully performed and completed the duties of their said employment.

IV.

That each of the allegations contained in Paragraphs, I, IV, V, VI, IX and X of said petition is true. That the court makes no determination or finding as to who are the heirs at law of Guadalupe Arenas, deceased.

V.

That the lands which are described in Paragraph VIII hereafter following now have available to

them a sufficient supply of water for all uses to which said lands have now been put and to which they could be put to the extent now reasonably foreseeable.

VI.

That petitioners have not been paid, nor have they received, any sum whatsoever for the services rendered by them in this action. That petitioners have advanced for necessary expenses in prosecuting this action the sum of Two Hundred Fifty-Eight and 67/100 Dollars (\$258.67), no part of which has been paid or refunded to them. That all of said compensation and expenses are due and unpaid.

VII.

That the lands described in Paragraph IV of said petition for supplemental decree herein lie within or near the City of Palm Springs, County of Riverside, State of California, and are subject to restrictions against alienation during the trust period which, unless extended by Presidential order [78] will expire on or about the 9th day of May, 1952.

VIII.

That the reasonable market value of plaintiff's interest and estate in the allotted lands, under the trust patent decreed to the plaintiff by this Court, is as follows:

Value of Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14,

Township 4 South, Range 4 East,

S.B.M., comprising two (2) acres. . . . \$ 40,000.00

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres \$66,000.00

Parcel (c) Desert: E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres..... 100,000.00

Value of Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres.....\$ 40,000.00

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres 66,000.00

Parcel (c) Desert: SE $\frac{1}{4}$ NW $\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres 100,000.00

Total Market Value of said parcels
of land\$412,000.00

IX.

That the reasonable market value of the fee simple title of the allotted lands described in Paragraph VIII hereof is the same as the reasonable market value of plaintiff's interest in said allotted lands, to wit, the sum of Four Hundred and Twelve Thousand Dollars (\$412,000.00).

X.

That the petitioners John W. Preston, Oliver O. Clark and David D. Sallee rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above-entitled cause for which said petitioners are entitled to receive as compensation the sum of Ninety Thousand Dollars (\$90,000.00), said amount being the reasonable value of said legal services. That no part of said amount has been paid to the petitioners, and all of said sum is due and unpaid.

XI.

That it is reasonable and equitable that until the compensation and expenses of suit due to the petitioners from the plaintiff, as described and set forth in Paragraphs VI and X of these Findings, are fully paid that the petitioners be secured by an equitable lien upon the whole of the lands allotted to the plaintiff, and to his wife, Guadaloupe Arenas, said lands being fully described in Paragraph VIII of these Findings.

XII.

That it is reasonable and equitable that the plaintiff be allowed a period of six (6) months from the date of the entry of the supplementary decree in this cause within which to pay the compensation and expenses of suit herein found to be due to the petitioners.

XIII.

That it is reasonable and equitable that if the plaintiff shall fail to pay the amounts found to be due and unpaid to said petitioners, the lands described in

Paragraph VIII hereof, or so much of [80] said lands as may be necessary, shall be sold to pay and satisfy the compensation and expenses of suit due from said plaintiff to said petitioners.

From the foregoing facts, the Court concludes:

CONCLUSIONS OF LAW

I.

That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee are entitled to receive as compensation for their services to the plaintiff in the above-entitled action the sum of Ninety Thousand Dollars (\$90,000.00), and the petitioners are also entitled to reimbursement from the plaintiff the sum of Two Hundred Fifty-Eight and 67/100 Dollars (\$258.67) advanced by said petitioners as costs and expenses of suit, and to judgment and decree for said compensation, costs and expenses.

II.

That the petitioners are entitled to an immediate equitable lien upon the lands allotted to plaintiff, said lands being fully described in Paragraph VIII of the foregoing Findings of Fact herein, to secure the payment of the compensation, costs and expenses of suit as described and set forth in Paragraph I of these Conclusions; and upon the entire interest of plaintiff and his heirs in said lands, if any, in the hands of the United States of America, until said compensation, costs and expenses shall be fully paid and satisfied.

III.

That the court should retain jurisdiction over this

action and the parties thereto and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method whereby, a judicial sale of plaintiff's lands shall be made and the proceeds thereof distributed as set forth in Paragraph I of these Conclusions, and in order to require and compel the enforcement, or the satisfaction and discharge, of the equitable [81] lien awarded to the petitioners; and for the purpose of appointing a commissioner to make said sale and to distribute the proceeds thereof; and, generally, for the purpose of effectuating and enforcing fully the judgment and decree herein, in accordance with the equitable jurisdiction, practice and procedure of this court.

IV.

That the parties to this proceeding should pay their own costs, respectively, incurred herein.

Dated this 5th day of April, 1951.

/s/ WM. C. MATHES,
Judge.

Approved as to form:

/s/ ERNEST A. TOLIN,
United States Attorney,

/s/ IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for the Defendant.

[Endorsed]: Filed April 5, 1951. [82]

United States District Court, Southern District of
California, Central Division

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT AND SUPPLEMENTAL DECREE

Be it remembered that John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore regularly filed their petition in the above-entitled cause praying that the Court make and enter a supplemental decree herein which should determine the amount of the compensation for services rendered by them to the plaintiff herein and the amount of costs and expenses paid by said petitioners on behalf of said plaintiff for which reimbursement has not been made by plaintiff, and fixing the time for the payment thereof and the manner of such payment and the security thereof, and for appropriate ancillary relief in respect thereof; and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein of the time and place of said hearing, before the above-entitled Court, Honorable William C. Mathes, a Judge thereof, presiding, in the courtroom of said court in the United States Post Office Building at the

northeast corner of Temple and North Spring Streets, in the City of Los Angeles, State of [83] California, on the 7th and 16th days of February, 1951;

Be it further remembered that upon said hearing the petitioners appeared personally and in their own behalf; the United States of America appeared by Ernest A. Tolin, Esq., United States Attorney, and Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, Department of Justice, and the plaintiff herein appeared personally and by the said Ernest A. Tolin, Esq., and Irl D. Brett, Esq., in their said official capacities;

Whereupon, evidence, both oral and documentary, was offered and received, and the cause was submitted to the Court for decision upon briefs of respective counsel; and the Court having made and filed its findings of fact and conclusions of law and having ordered that judgment be entered in accordance therewith;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

First: That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff in the above-entitled action the sum of Ninety Thousand Dollars (\$90,000.00).

Second: That the petitioners have and recover from the plaintiff the further sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) heretofore

paid by the petitioners for the use and benefit of the plaintiff in the above-entitled action.

Third: That the payment of the compensation awarded hereby to the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee, and the payment of said sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) heretofore paid by said petitioners for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the lands allotted to said plaintiff under the allotment proceedings of 1927 and upon all rights conferred upon said plaintiff by said allotment [84] proceedings, and upon the entire interest and estate of said plaintiff and his heirs in said lands, and upon the entire interest, if any, in said lands in the hands of the United States of America; and said equitable lien shall be and continue in full force and effect until the compensation herein and hereby awarded to said petitioners, and until said sum of Two Hundred Fifty-eight and 67/100 Dollars (\$258.67) paid by said petitioners for the use and benefit of said plaintiff, shall be fully paid and satisfied. The lands allotted to said plaintiff, upon which said equitable lien is impressed by this judgment and supplemental decree, are situated in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, County of Riverside, State of California, and are more particularly described as follows, to wit:

Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Town-

ship 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres;

Parcel (c) Desert: $E\frac{1}{2}$ $SW\frac{1}{4}$ $NW\frac{1}{4}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$ and $SW\frac{1}{4}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres.

Lands Allotted to Guadalupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.M., comprising five (5) acres;

Parcel (c) Desert: $SE\frac{1}{4}$ $NW\frac{1}{4}$ all in Section 26, Township 4 South, Range 4 East, S.B.M., comprising forty (40) acres, said six (6) tracts totaling ninety-four (94) acres, as shown by the Special Allotting Agent's Schedule of May 9, 1927.

Fourth: That the plaintiff, Lee Arenas, be and he is hereby allowed a period of six (6) months from and after the date [85] of the entry of judgment and supplemental decree herein within which to pay the compensation and expenses of suit awarded to the petitioners, as described and set forth in Paragraphs First and Second hereof.

Fifth: That if the said plaintiff shall fail to pay and fully satisfy the compensation and expenses of suit awarded to said petitioners, as described and

set forth in Paragraphs First and Second hereof, within six (6) months from the date of the entry of judgment and supplemental decree herein, then and in that event the lands allotted to said plaintiff, as described in Paragraph Third hereof, shall be sold pursuant to the further orders and directions of the Court and in the manner and form provided by the federal statutes, and the proceeds of such sale, or sales, shall be distributed as follows, to wit: (1) to pay the costs and expenses of sale, including fees of a commissioner to make such sale; (2) to the payment of the compensation and expenses of suit awarded hereby to said petitioners; and (3) the balance shall be paid to the United States of America in trust for the plaintiff.

Sixth: The Court hereby retains jurisdiction over this action and the parties thereto and the subject matter thereof, in order to act upon and determine the time, or times, when and the manner in which, and the method, or methods, whereby said allotted lands shall be sold and the payment of the compensation and expenses of suit hereby awarded to said petitioners shall be made to them, and in order to require and compel the enforcement, satisfaction and discharge of the equitable lien herein and hereby awarded to the petitioners, and in order to make and confirm a sale of said lands of the plaintiff, and to make distribution of the proceeds of said sale to the parties thereto as hereinabove provided, and in order to fully effectuate and enforce the judgment and supplemental decree herein in accordance with

the equitable [86] jurisdiction, practice and procedure of this court.

Seventh: That no determination is made herein as to who are the heirs at law of Guadalupe Arenas, deceased.

Eighth: That the parties to this proceeding pay their own costs, respectively, incurred herein.

Dated this 5th day of April, 1951.

/s/ WM. C. MATHES,
Judge.

Judgment entered 4/6/51.

[87]

[Endorsed]: Filed April 5, 1951.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL AND MOTION
TO AMEND FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND JUDG-
MENT, PURSUANT TO RULE 52, F.R.C.P.

Comes Now the United States of America, defendant in the above entitled action, and moves this Court for an Order setting aside the Findings of Fact and Conclusions of Law dated April 5, 1951, and the Judgment and Supplemental Decree entered thereon April 6, 1951, granting to the plaintiff and United States of America, as defendant, a new trial in the above entitled action as to the Judgment in favor of the petitioners, John W. Preston, Oliver O. Clark, and David D. Sallee, for attorneys' fees and

expenses, upon the following grounds and for the following reasons, to-wit:

1. Insufficiency of the evidence to justify the Findings of Fact;
2. Error in law occurring at the trial;
3. That the said Findings of Fact and Judgment are against the law.

That the said Motion will be based on the pleadings and papers on file upon the Minutes of the Court, the Court Reporter's transcript [88] of the testimony, and upon all the pleadings and papers on file in this proceeding, including all exhibits offered and received in evidence.

And pursuant to Rule 52 F.R.C.P., the United States of America further moves, in the event the Motion for New Trial is denied, to amend the aforesaid Findings of Fact and Conclusions of Law and the aforesaid Judgment and Supplemental Decree thereon, in the following particulars, to-wit:

I.

To amend Finding of Fact No. X to read as follows:

“That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee rendered and performed legal services for and on behalf of, and at the request of, and by agreement with, the plaintiff in the above entitled cause, for which said petitioners are entitled to receive as compensation 221½ per cent of the reasonable market value of the allotted lands described in paragraph VIII hereof, up to, but not exceeding, the sum of \$90,000.00

herein; that no part of said compensation has been paid to the petitioners, and all of said compensation is due and unpaid.”

II.

To amend Conclusion of Law No. I to read as follows:

“That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee are entitled to receive as compensation for their services to the plaintiff in the above entitled action $22\frac{1}{2}$ per cent of the reasonable market value of the allotted lands described in paragraph VIII hereof, up to, but not exceeding, the sum of \$90,000.00; and the petitioners are also entitled to reimbursement from the plaintiff the sum of \$258.67, advanced by said petitioners as costs and expenses of suit [89] and to judgment and decree for said compensation, costs and expenses.”

III.

To Amend paragraph First of the Judgment and Supplemental Decree to read as follows:

“First: That the petitioners John W. Preston, Oliver O. Clark, and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and in behalf of said plaintiff in the above entitled action, a sum equivalent to $22\frac{1}{2}$ per cent of the reasonable value of the plaintiff's interest and estate in the allotted lands under the trust

patent decreed to the plaintiff by this Court, up to, but not exceeding, the sum of \$90,000.00.”

Dated: April 16, 1951.

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By A. WEYMANN,

Special Attorney, Lands Division

Department of Justice,

Attorneys for Defendant, United States of America. [90]

Acknowledgment of Service attached.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

The motion of the United States of America and Lee Arenas for a new trial in the above entitled action of the issue as to attorney fees and expenses pursuant to the mandate of the Court of Appeals for the Ninth Circuit, as reported in *Arenas vs. Preston*, 181 Fed. (2d) 62, having been regularly continued for hearing before this court on Monday, May 7, 1951, at the hour of ten o'clock a.m. and having come on regularly for hearing before the Honorable Wm. C. Mathes in Court Room No. 2, second

floor, United States Post Office and Court House Building, at Los Angeles, California, in the forenoon of said date, the United States of America being represented by Irl D. Brett, Esq., Special Assistant to the Attorney General; petitioners being represented by John W. Preston, Esq., and the private counsel of Lee Arenas, John M. Ennis, Esq., being present, though not participating in the argument; and the cause having been submitted to the court for consideration and decision, upon the Specification of Errors and Points and Authorities served and filed by the moving parties, and upon oral argument by respective counsel, [92]

It Is Ordered that the motion for new trial be and it is hereby denied.

Done in open Court May 7, 1951.

/s/ WM. C. MATHES,
Judge of U. S. District Court.

Presented by:

ERNEST A. TOLIN,
United States Attorney,
IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for Defendant, United States of America.

Approved as to form:

/s/ JOHN W. PRESTON,
Attorney for Petitioners. [93]

[Endorsed]: Filed May 22, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO AMEND
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The motion of Lee Arenas and the United States of America pursuant to Rule 52(b), R.C.P. that, in the event their motion for new trial is denied, the Findings of Fact and Conclusions of Law and Judgment be amended in the particulars recited and set forth in said Motion to Amend, having come on regularly for hearing before the court on Monday, May 7, 1951, in the forenoon, and the court having heretofore denied the motion for new trial by the same parties, there being present Irl D. Brett, Esq., Special Assistant to the Attorney General, representing the United States of America, John W. Preston, Esq., representing the petitioners, and John M. Ennis, Esq., representing Lee Arenas as his private counsel; and the cause having been submitted to the court for consideration and decision, upon the Specification of Errors and Points and Authorities heretofore served and filed by the moving parties and upon argument of respective counsel, and the petitioners having objected to such amendment, the Court has determined that under the mandate of the Court of Appeals for the Ninth Circuit, arising out of the decision of that court which is reported in *Arenas vs. Preston, et al.*, 181 Fed. (2d) 62, it is not within the power and authority of the court [95] to so modify the Findings of Fact, Conclusions of Law, and Judgment over

the objection of petitioners, such motion is upon that ground and for such lack of authority and power, denied.

Done in open Court May 7, 1951.

/s/ WM. C. MATHES,

Judge of U. S. District Court.

Presented by:

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Defendant United States of America. [96]

[Letterhead of John W. Preston]

May 9, 1951

[Stamped]: Received May 10, 1951, Lands Division, Los Angeles, California.

Irl D. Brett, Esq., Special Assistant to the Attorney General, Lands Division, 807 U. S. Post Office and Court House Building, Los Angeles 12, California.

In re Lee Arenas vs. United States of America No. 1321-WM Civil

Dear Irl:

I have your favor of May 7th relative to the formal orders in the above-entitled cause.

I have signed the approval as to the motion for a new trial; the other I have not signed, nor have I

approved, because I do not think that it is a proper insertion in such an order. The function of the court is to grant or deny, and attempting to limit itself, in my opinion is not the proper thing to do. You can state to Judge Mathes that I have declined to approve the same as to form or otherwise.

Yours truly,

/s/ John W. Preston

JWP:eb—Encs.

[98]

[Endorsed]: Filed May 22, 1951.

United States District Court, Southern District of
California, Central Division

No. 1321—WM—Civil

LEE ARENAS,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Appellant,

and

JOHN W. PRESTON, OLIVER O. CLARK and
DAVID D. SALLEE,

Petitioners and Appellees.

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America and Lee Arenas hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment and Supplemental Decree made and entered herein on April 6, 1951 in Judg-

ment Book 71 at page 729, in favor of John W. Preston, Oliver O. Clark and David D. Sallee, petitioners, and against Lee Arenas, plaintiff and respondent, and the United States of America, defendant and respondent, and from the whole thereof.

Dated: July 20, 1951.

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Appellants. [99]

[Endorsed]: Filed July 20, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The United States of America and Lee Arenas, appellants in the above-entitled cause, submit the following statement of points which will be relied upon on appeal:

1. The Court erred in assuming jurisdiction to determine the petition for attorneys' fees and moneys advanced as expenses of suit in this proceeding;

2. The Court erred in finding, concluding and adjudging that petitioners were entitled to an equit-

able lien upon the trust patent allotments to secure the payment of attorneys' fees and moneys advanced as expenses of suit, and in failing to find and conclude that it was without jurisdiction to impose such a lien;

3. The Court erred in finding, concluding and adjudging that the lands involved should be sold at public auction [100] to satisfy the lien in the event that the judgment for fees and expenses should not be paid, and in failing to find that it was without jurisdiction so to do;

4. The Court erred in basing the award of compensation upon the market value of the full fee title to the lands involved rather than upon the market value of the Indian's interest therein;

5. The finding (Finding No. IX) that the value of the fee simple title to the lands involved was the same as the value of the Indian's interest therein is not supported by the evidence and is contrary to the evidence in the case;

6. The values found for the Indian's interest in the various parcels of the allotment (Finding No. VIII) are excessive and not supported by competent evidence;

7. The Court erred in denying the motions to strike the opinions of value expressed by petitioners' witnesses Gallagher and Beckley;

8. The Court erred in denying the Government's motion for a new trial;

9. The Court erred in denying the Government's alternative motion to amend findings of fact, conclusions of law and the judgment to provide for

recovery measured by a percentage of the value of the allotment, up to but not exceeding the amount awarded.

Dated: August 6, 1951.

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Appellants. [101]

Affidavit of Service by Mail attached.

[Endorsed] Filed Aug. 6, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The United States of America and Lee Arenas, appellants in the above entitled cause, designate the following for inclusion in the record on appeal:

1. Petition for Supplemental Decree, etc., filed October 24, 1947;
2. Order to Show Cause, filed October 24, 1947;
3. Special appearance of, and motion to dismiss by, the United States, filed December 16, 1947;
4. Affidavit of Irl D. Brett, including Exhibit No. 1 thereto, filed December 16, 1947;
5. Order denying dismissal, filed December 31, 1947;

6. Answer to petition and order to show cause, filed February 9, 1948;

7. Motion to strike valuation opinions of petitioners' witnesses Gallagher and Beckley, filed February 20, 1948; [102]

8. Transcript of proceedings on March 31, 1948 (oral opinion of the Court);

9. Findings of Fact and Conclusions of Law, filed May 3, 1948;

10. Judgment, filed May 3, 1948;

11. Notice of Appeal by the United States and Lee Arenas, filed June 30, 1948;

12. Opinion of the United States Court of Appeals for the Ninth Circuit in C. A. No. 12046, filed March 23, 1950;

13. Judgment of the United States Court of Appeals for the Ninth Circuit in C. A. No. 12046, filed March 23, 1950;

14. Motion to strike the valuation opinion of petitioners' witness Gallagher, filed February 16, 1951;

15. Minute entry of February 16, 1951, showing denial of motion to strike the valuation opinion of petitioners' witness Gallagher;

16. Findings of Fact and Conclusions of Law, filed April 5, 1951;

17. Judgment and Supplemental Decree, filed April 5, 1951, and entered April 6, 1951;

18. Motion for new trial and motion to amend findings of fact, conclusions of law, and judgment, filed April 16, 1951;

19. Order denying motion for new trial, filed May 22, 1951;

20. Order denying motion to amend findings of fact, conclusions of law, and judgment, filed May 22, 1951;

21. Notice of appeal, filed July 20, 1951;

22. The following portions of the transcript of the proceedings in 1948; [103]

(a) Volume I, page 53, line 20, to page 158, line 16, being the entire testimony of Joseph A. Gallagher on February 11 and 12, 1948;

(b) Volume I, page 158, line 19, to page 168, line 19, being the entire testimony of Benton Beckley on February 12, 1948;

(c) Volume III, page 358, line 16, to page 360, line 1, being statements made on February 20, 1948, with reference to the Government's motion to strike the opinions expressed by Gallagher and Beckley;

(d) Volume III, page 402, line 20, to page 412, line 5, being the argument on the motion to strike and the ruling of the court on March 29, 1948;

23. The entire transcript of the proceedings on February 7, 1951;

24. The excerpt of the proceedings on February 16, 1951, relating to the admission in evidence of Exhibit S;

25. The transcript of the proceedings on May 7, 1951, being the argument and ruling on the motion for new trial and motion to amend findings, etc.;

26. The following exhibits: Petitioners' Exhibits Nos. 6, 6-A, 7, 14 (including all maps and photographs therewith), 14-A, 14-B, and 17; Respondents'

Exhibits A, B, C, F, G, H, I, J, N (filed February 17, 1951) O, P, Q, R, and S;

27. Statement of Points on appeal;

28. This designation of record.

Dated: August 6, 1951.

ERNEST A. TOLIN,

United States Attorney,

IRL D. BRETT,

Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,

Attorneys for Appellants. [104]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 6, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF IRL D. BRETT IN SUPPORT
OF APPLICATION FOR ORDER ENLARG-
ING TIME TO FILE THE RECORD ON
APPEAL AND DOCKET THE ACTION
[R. C. P. 73(g)]

United States of America,
Southern District of California—ss.

Irl D. Brett, being first duly sworn, says:

I am one of the attorneys for appellants, United States of America and Lee Arenas, in the above numbered and entitled cause. That on July 20, 1951 said appellants filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from

the Judgment and Supplemental Decree made and entered herein on April 6, 1951 in Judgment Book 71 at page 729, in favor of petitioners and appellees, John W. Preston, Oliver O. Clark and David D. Sallee, and against the above named appellants.

That on August 6, 1951 appellants filed their Designation of the Record and their Statement of Points on Appeal; that appellees have filed no counter-designation. That included in the items designated in the Designation of the Record are writings which were included in the Record on Appeal in a companion case entitled "Eleuteria Brown Arenas, [106] also known as Della Nicholson, plaintiff, vs. United States of America, defendant", No. 6221-PH Civil, in which the Notice of Appeal to the Court of Appeals for the Ninth Circuit was filed on May 1, 1951 and in which the Record on Appeal was filed and docketed as No. 12962 on June 7, 1951.

That in order for the Clerk of this Court to certify the record on this appeal it is necessary that the instruments included in the Record on Appeal in case No. 6221-PH Civil be returned to him by the Clerk of the Court of Appeals. That affiant has been endeavoring to effect such arrangement but has not completed the same and unless extended by this Court under 73(g), R.C.P., the time for filing the Record on Appeal and docketing this action in the Court of Appeals will expire on August 29, 1951.

That Hon. Edmund L. Smith, Clerk of this Court, has estimated and suggested to affiant that it will require an additional thirty (30) days beyond such

date for him to prepare, certify, file and docket the record herein.

Upon the basis of such estimate and suggestion affiant respectfully prays that this Honorable Court make an order enlarging the time to file the record on this appeal and docket the action in the Court of Appeals for the Ninth Circuit, to and including September 28, 1951.

/s/ IRL D. BRETT,

Subscribed and sworn to before me this 24th day of August, 1951.

[Seal] EDMUND L. SMITH,
Clerk, United States District Court, Southern Dis-
trict of California. [107]

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 24, 1951.

[Title of District Court and Cause.]

ORDER ENLARGING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
THE ACTION [R. C. P. 73(g)]

Upon application of the United States of America in its own behalf and in behalf of Lee Arenas, as appellants, and the affidavit of Irl D. Brett, one of the attorneys of record for appellants, and good cause appearing therefor,

It Is Ordered that the time for the filing of the Record on Appeal and the docketing of this action in the Court of Appeals for the Ninth Circuit, pursuant to the appeal filed by appellants, United

States of America and Lee Arenas, on July 20, 1951, and the Designation of the Record and the Statement of Points on Appeal by such appellants, filed August 6, 1951, be, and the same is, hereby extended to and including September 28, 1951.

Dated: August 24, 1951.

/s/ WM. C. MATHES,
United States District Judge.

Presented by:

ERNEST A. TOLIN,
United States Attorney,
IRL D. BRETT,
Special Assistant to the Attorney General,

/s/ By IRL D. BRETT,
Attorneys for Appellants. [108]

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 24, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 108, inclusive, contain the original Petition for Supplemental Decree for Attorneys' Fee and Expenses Advanced, for Sale of Property and for Appointment of Receiver; Order to Show Cause; Special Appearance of, and Motion to Dismiss by, The United States of America; Affidavit of Irl D. Brett; Order Denying Dismissal; Answer to Petition and Order to Show Cause in re Supplemental Decree for Attorneys' Fees and Expenses Advanced, for Sale of Property and for Appointment of Receiver; Motion to Strike Certain Testimony of Witnesses Joseph A. Gallagher, Sr., and Benton Beckley; Findings of Fact and Conclusions of Law filed May 3, 1948; Judgment filed May 3, 1948; Notice of Appeal filed June 30, 1948; Motion to Strike Portion of Testimony of Joseph A. Gallagher, Sr.; Findings of Fact and Conclusions of Law filed April 5, 1951; Judgment and Supplemental Decree filed April 5, 1951; Motion for New Trial and Motion to Amend Findings of Fact and Conclusions of Law and Judgment; Order Denying Motion for New Trial; Order Denying Motion to Amend Findings of Fact, Conclusions of Law and Judgment; Notice of Appeal filed July 20, 1951; Statement of Points on Appeal; Designation of Record on Appeal and Application and Order Ex-

tending Time to Docket Appeal and a full, true and correct copy of minute order entered February 16, 1951 which, together with copy of reporter's transcripts of proceedings on February 10, 11, 12 and 20, 1948, March 9, 1948, March 29 and 30, 1948, March 31, 1948, February 7 and 16, 1951 and May 7, 1951 and original Petitioners' Exhibits 6, 6-A, 7, 14, 14-A, 14-B and 17 and Respondents' Exhibits A, B, C, F, G, H, I, J, N, O, P, Q, R and S, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 17th day of September, A.D. 1951.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy.

In the United States District Court, Southern
District of California, Central Division

Honorable William C. Mathes, Judge presiding.

No. 1321—O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Tuesday, Feb. 10, 1948

Appearances:

For Petitioners in Pro Per: John W. Preston,
Esq., Oliver O. Clark, Esq., and David D.
Sallee, Esq.

For Respondents: Jerry Geisler, Esq., Meyer M.
Willner, Esq., and H. L. Thompson, Esq. (sub-
stituted for Messrs. Geisler, Willner and
Thompson), John H. Taheny, Esq., and Horace
A. Hibert, Esq., Irl D. Brett, Esq., Spec.
Asst. to the Attorney General of the United
States. [1*]

(Volume I, page 18, lines 4 to 18 (2-10-48):

The Court: Very well. Under the stipulation, as I
understand it now, the testimony given under oath
and the Interrogations will be deemed, for the purpose
of this proceeding, as given under oath from the wit-

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

ness stand here, and the documents attached as Exhibits 1, 2, and 3, introduced in evidence in support of such testimony.

The letters attached to the Interrogations, marked Exhibits 1, 2, and 3, respectively, are received in evidence and will be marked here Exhibits 1, 2, and 3 in evidence. The Interrogations are received in evidence.

Mr. Preston: Better take the letter "A," hadn't they?

The Court: The letters will be marked Petitioners' Exhibits 1, 2, and 3; the Interrogations, marked Petitioners' Exhibit 4; the stipulation will be received into evidence and will be marked Petitioners' Exhibit 5.

[Printer's Note: Petitioner's Exhibits 1, 2, 3 and 4 are set out at pages 463-516, Exhibit 5 at page 528 of this printed record.]

(Volume I, page 26, line 11, to page 29, line 16 (2-10-48):

Mr. Preston: We next offer in evidence, may it please the court, a document prepared by me on the data furnished by the respective petitioners, entitled Statement of Facts, a document referred to in the Interrogations Exhibit No.— what is the Interrogations?

The Court: 4 [2]

Mr. Preston: —Exhibit No. 4, a copy of which was exhibited at that time to counsel for the Government and for Lee Arenas. Do you need another copy of it?

Mr. Brett: No; we have it. Now, if the court

please, I direct your attention to Exhibit 4, the Interrogations. The document reads as follows:

“Judge Preston handed Mr. Brett, in the presence of Messrs. Oliver O. Clark and David D. Sallee, a document entitled ‘Statement of Facts’——

Mr. Preston: What page are you reading from?

Mr. Brett: End of 1.

“——in reference to the services performed by them, and each of them, in the case of Lee Arenas vs. United States.”

“Q. (By Mr. Brett): As I understand it, Mr. Sallee, the Statement of Facts, which has just been handed to me, consisting of eight pages and reciting certain facts respecting your activities are set forth in the Petition upon which the Order to Show Cause is based, may be deemed, for the purpose of the Stipulation, a statement of facts as you would testify to them in connection with what you did as attorney for Lee Arenas in this case? [3]

“A. Yes.”

As there stated, we are perfectly agreeable it go in; in other words, that it be deemed to be the equivalent of the testimony that would have been given by either Mr. Sallee or Mr. Oliver O. Clark, much of it being prior to Judge Preston’s entry in the case, if they were called to the stand and testified under oath.

I am trying to distinguish between stipulating facts themselves and stipulating to the fact that they would have so testified, to shorten the matter here.

The Court: This should be a supplement, then, to Exhibit 4, should it not?

Mr. Preston: That is what it really is.

The Court: It is incorporated by reference in the testimony of petitioners given in Exhibit 4.

Mr. Brett: That is correct.

The Court: Is there objection to receiving it for that purpose?

Mr. Brett: No, sir.

The Court: It will be received in evidence, then and be marked Exhibit 4-A here.

[Printer's Note: Petitioner's Exhibit 4A is set out at page 516, Exhibit 4B at page 526 of this printed record.]

Mr. Preston: You are discriminating against the person, is that correct? I made a statement myself. I want to know if you have any objection to it.

Mr. Brett: That was not intended, your Honor, except [4] that was a statement of services before Judge Preston went into the case. And I think it may be generally stipulated, then, that it is a part of Exhibit 4 and be received in the same manner.

The Court: As testimony on behalf of the petitioners, given by one or more or all of them.

Mr. Brett: That is correct.

The Court: Gentlemen, may it be understood now with respect to the attorneys appearing for the Government and Lee Arenas—I have heretofore stated that any objection made by one of you I

should take to be the objection of all—is it also understood that any want of any objection by any of you should be taken as an assent?

Mr. Brett: Unless otherwise expressed.

The Court: Yes. Unless one or more of you express some objection, it will be deemed that whatever is said is assented to.

Mr. Brett: On behalf of the Government that is stipulated to.

The Court: On behalf of the Government or Lee Arenas.

Mr. Preston: Will this Statement of Facts carry a supplemental number, your Honor?

The Court: It will be marked Exhibit 4-A in evidence, and that will tie it into Exhibit 4 of which it is a part and substance. [5]

(Volume I, page 53, line 20 to page 158, line 18):

JOSEPH A. GALLAGHER

called as a witness by petitioners, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Joseph A. Gallagher, G-a-l-l-a-g-h-e-r.

Direct Examination

By Mr. Clark:

Q. Where do you live, Mr. Gallagher?

A. 1337 Edgecliffe Drive, Los Angeles.

Q. How long have you resided continuously last past in this vicinity?

A. About 13 or 14 years.

(Testimony of Joseph A. Gallagher)

Q. In what vocation are you engaged?

A. I happen to be president of American Right of Way and Appraisal Contractors. That is an organization—I believe it is the only organization of its kind in the country. We specialize in the acquisition of rights of way and also in the appraisal of properties for rights of way purposes.

Q. How long have you been engaged in that connection?

A. I have been engaged in the right of way profession for approximately 23 years; in the appraisal profession about the same length of time. [6]

Q. And has that been your vocation throughout the entire period of your residence of 13 years in this vicinity?

A. Well, for a short period I had an office, a real estate office, on Crenshaw over near Olympic Boulevard, and engaged rather extensively in real estate operations in this city, and also in appraisal work and in the acquisition of rights of way.

Q. How large an organization in personnel is this organization of which you are president?

A. We have approximately 39 men active or on call at all times. In that 39 men we have quite a few surveyors, we have licensed engineers and licensed surveyors, and we are equipped to survey property as well as to acquire rights of way and appraise property.

Q. And in the conduct of the business of that organization is that personally under your immediate supervision and direction?

A. Yes, sir.

(Testimony of Joseph A. Gallagher)

Q. In the capacity of appraiser and as one engaged in the acquisition of rights of way, what organizations or governmental agencies have you or your organization represented during the past 10 or 15 years?

A. Well, in the early thirties I was district land agent for the Department of Water and Power.

Q. Of the City of Los Angeles? [7]

A. Of the City of Los Angeles. And in my capacity as district land agent I supervised the activities of the rights of way men, the field agents, and, in two particular instances of the appraisers. Those instances were in the acquisition of rights of way and appraisal of properties for the two Boulder Canyon transmission lines; also, when we brought additional water supply into Los Angeles from points north of Bishop, from LaVina. We had our headquarters at LaVina. I was then with the Department of Water and Power and added those particular classifications. I was engaged in the appraisal of property in the five towns in Owens Valley: Bishop, Lone Pine, Big Pine, Independence, and Laws.

I also appraised other large parcels of property for the Department, especially back in the mountains where the tank sites are; acreage at Sepulveda and San Fernando, near the San Fernando reservoir.

I rendered appraisals on houses on 98th Street, where the line comes in as it laps the city by way of 98th Street.

(Testimony of Joseph A. Gallagher)

I conducted a survey for the Department of Water and Power in industrial plants, an industrial survey in Southern California; likewise, a survey of business buildings for rental purposes.

While employed by the Department of Water and Power of the City in 1933 I was sent on a trip which took in approximately nine states. I believe that is the first time that [8] the Department had even sent a man out in the performance of a duty similar to this one. Starting in at Arizona, Nevada, Oklahoma, Missouri, Tennessee, Knoxville, Tennessee, Kentucky, Wheeling, West Virginia, that is as far east as I went, and then started back, Wisconsin, Illinois, Kansas, Colorado, Utah, and back to Los Angeles.

The following year the Department sent me to Victoria and Vancouver, British Columbia, on another special assignment.

I left the Department about the year 1939.

Q. In the practice of your profession have you also served the United States Government?

A. During World War II I was project manager for the U. S. Engineers, and in that capacity I served, I handled in the communication lines, that is, the acquisition for rights of way for communication lines along the coast as far as Mexico. The acquisition of rights of way for communication lines that took in roadway installations and gun emplacements. I worked close to the army, also worked close to the navy, worked very close to the Department of Justice. Besides handling the acquisitions of rights of way for communication lines, roadway installa-

(Testimony of Joseph A. Gallagher)

tions and gun emplacement I acquired property for airports, and mention Lomita flight strip. I was on the Metropolitan airport and a few others, and hospital sites. And the Bolsa Chica acreage, I handled that acquisition. I worked all through the war, possibly three years, [9] for the U. S. Engineers in the acquisitions of rights of way. I work close to the appraisers who were working under contract.

I refer particularly to the appraisal of property at Lomita, Lomita flight strip, and appraisal of property at San Pedro and Sepulveda's property at San Pedro. I refer to the roadway installations and communication properties in San Diego County, also those properties at Bolsa Chica near Huntington Beach.

Q. In the practice of your profession have you served the State of California?

A. Yes. I happen to be special examiner for the State Personnel Board for the State of California.

Q. Will you state what that duty consists of?

A. That is examining applicants for civil service positions, the division of highways. These civil service positions pertain to real estate classifications, appraisers and rights of way men; that is, I have examined for several years for the State, examining here in Los Angeles and San Francisco and in Sacramento. As a matter of fact I received a letter just possibly a month ago from the State Personnel Board in which the State Personnel Board tells me or told me that they consider me to be a part of their organization for examining purposes.

(Testimony of Joseph A. Gallagher)

Q. Have you served the California Division of Highways [10] in making any appraisals of properties involved in its activities?

A. In an indirect way; yes. I have appraised property in Pasadena. We appraised that property last month for the widening of Foothill Boulevard. The City of Pasadena and the State of California are naturally interested in the widening of these different arterials for freeway and highway purposes.

I appraised Foothill Boulevard from Santa Anita Avenue to Sierra Madre Villa Avenue for the City of Pasadena.

I have appraised other properties for highway purposes, representing property owners in these particular instances. One is from the City of Pismo Beach to close to San Luis Obispo, representing the Carpenter estate.

I also represented property owners in the Hollywood Freeway at Sunset Boulevard and Figueroa, represented property owners in the widening of portions of Vernon Avenue. I represented property owners whose property was affected by a sanitation sewer line in Montebello. I represented several of the small communities in and around Los Angeles in special appraisal work and acquisitions of rights of way.

At the present time I am representing Ventura County. We have already appraised Ventura River levee. The United States engineers are naturally interested in construction work and their contractor is

(Testimony of Joseph A. Gallagher)

ready to go down there and start [11] clearance at the present time. That appraisal is a completed appraisal.

I represented Ventura County in the acquisition of two dam sites, Matilija Dam and the Casitas Dam. The property for the Matilija Dam has already been acquired. Casitas Dam property is at an estoppel at the present time until a few engineering complications have been taken care of.

I have an office with the County Engineer in Ventura County.

Q. In your experience in the capacities to which you have testified have you done any work for the Southern California Gas Company and the Southern Counties Gas Company?

A. I entered into a contract with the Southern California Gas Company and Southern Counties Gas Company to appraise the property for the biggest inch gas line from Texas and New Mexico. That was a 30-inch line. My work started at the Colorado River east of Blythe, and I appraised the property from the Colorado River east of Blythe to Santa Fe Springs. All of the property affected by that biggest inch gas line was covered from Texas and New Mexico to Los Angeles. That took in quite a large acreage.

Q. Have you represented the Standard Oil Company and other major oil companies in the appraisal of properties?

A. I have served as a special representative of Standard Oil. I was with Standard Oil on the Stan-

(Testimony of Joseph A. Gallagher)

pac deal during the war. We were trying to push oil across the Pacific [12] when the boys needed oil there. And that was a 175-mile deal from Bakersfield to San Francisco. I was on that deal for almost a year.

Completing that, Standard brought me down here to acquire rights of way and do appraisal work on another line running through Compton, Huntington Beach and South Gate. I represented Standard Oil in several instances.

Q. In the description you have stated your activities in that profession have you included any service which you have rendered, if such there were, to the Department of Finance of the State of California?

A. I have likewise appraised for the Department of Finance of the State of California. One of the properties was located at Brea, and the reason for that appraisal was for the expansion of Pacific Colony. That took in, I believe, 200 some odd acres. I forget now just what the acreage was.

I have likewise appraised property at San Gabriel for the Department of Finance of the State of California.

Q. Have you made any appraisals for any school districts?

A. I have represented the Arcadia school district; I represented Protero High School District; I represented the Santa Pula School District in the appraisal of property.

Q. Have you also appraised properties in down-

(Testimony of Joseph A. Gallagher)

town Los Angeles, business properties? [13]

A. I have appraised some downtown business properties. I refer particularly to the northeast corner of Los Angeles, Los Angeles and Aliso Street, that large corner there. I appraised that property, representing Guthrie, Darling and Shattuck, attorneys. I at the present time am about ready to enter into an appraisal of another piece of property on Broadway which possibly will be a matter of hearing in—I don't know just when.

Q. Are you a college graduate?

A. Yes, sir.

Q. Of what university? A. Notre Dame.

Q. In what year? A. 1909.

Q. In the experiences you have had in appraisal work have you had occasion to appraise properties throughout the Palm Springs area prior to your appraisal of properties for the purpose of this immediate hearing?

A. Yes, sir I have, in the acquisition of rights of way. For this biggest inch gas line we naturally took in in our appraisal work an area, not just exactly contiguous to the line itself, but we took in an area, oh, possibly two or three miles and even farther than that on each side of the line, made a comprehensive survey of the area around the All American Canal on that occasion. [14]

I spent a lot of time at Palm Springs. As a matter of fact, I have appraised property at Palm Springs for Bob Hope. I have represented his wife in the acquisition of property at Palm Springs. Mr. Hope

(Testimony of Joseph A. Gallagher)

has asked me to do some other special work for him in the area of Palm Springs. That work I have done and which work I did not complete. I have actually spent quite a bit of time there at Palm Springs.

Q. And when was it that you did this work in Palm Springs area in connection with your appraisal of the right of way for the gas line?

A. In '45 and '46.

Q. Have you made any special investigation and study of the valuation and adaptability to use of properties in the Palm Springs area under employment by petitioners in this case? A. I have.

Q. Did you engage the services of the personnel of your organization in making that investigation and study? A. I did.

Q. And did you, at the request of the petitioners in this case, prepare in written form, supplemented by maps, photographs, and other data, a report as of date December 9, 1947? A. I did.

Q. And was the work which was done in connection with [15] that service on behalf of the petitioners in this case all done either by yourself personally or under your immediate supervision by the personnel of your office?

A. It was done by me personally and also by the personnel of my office.

Q. Acting under your immediate supervision?

A. Acting under my immediate supervision.

Q. And where any service of that sort was rendered by the personnel of your organization did you personally take the occasion to verify to your satis-

(Testimony of Joseph A. Gallagher)

faction the accuracy of that which was reported to you? A. I did.

Q. And have you embodied within the report to which I have referred the data which was obtained, as you have said, in the course of that study?

A. I have.

Q. In connection with that study and in preparing yourself to form and express an opinion, first, as to the highest and most valuable use to which the properties involved in this proceeding were adapted, and secondly, as to the reasonable market value of those properties, how many other properties did you take into consideration?

A. Typical and comparable properties, I believe we had between 100 and 120 that we took into consideration. The report shows 60 some odd—66, I believe, but over a hundred [16] we took into consideration.

Q. And what investigation, particularly, without going into the matter in too much detail, did you make with reference to the adaptability to use of the properties immediately involved here and the comparability of the other properties to which you have referred as to which you gave consideration?

A. I believe we made a rather thorough investigation of that. When we first went to Palm Springs to start this assignment of work, we drove around Section 14 and Section 26. We wanted to get a good picture of those two sections in reference to adjacent sections on the north, south, east, and west of 14 and 26. After driving around Section 14 and Sec-

(Testimony of Joseph A. Gallagher)

tion 26, we started at the northwest corner of Section 11, which is north of Section 14.

We drove down Indian Avenue to where Indian Avenue joins with Palm Canyon Drive and continues on to Indio. We drove that distance in order to ascertain the type of developments, the real estate activities in and around Palm Springs and in and around the general area east of Palm Springs. We likewise drove Palm Canyon Drive from the northerly boundary line of Section 11 to the junction point with Indian Avenue in order to establish in our minds a picture of the type of development along Palm Canyon Drive. That is where the civic center of Palm Springs is, there in Section 15 next to Section 14. [17]

We then drove north on Ramon, on Ramon Avenue, by the high school. Ramon Avenue is the street to the northerly boundary line of Section 26. It is the southerly—well, we drove Ramon Avenue, the boundary line of Section 04, Ramon Avenue by the high school, by the airport, to Thousans Palms—that is right up the highway, right near Alonzo Bell's property—trying to ascertain the particular type of development and real estate activities in that area north and south. We made a comprehensive study of the developments around Garnet, a very comprehensive study of those developments.

After doing that and establishing this picture and view, and inspecting several of those new subdivisions which are now where structures have been built, we called at the offices of the Palm Springs

(Testimony of Joseph A. Gallagher)

Water Company for information regarding water rates; we called at the offices of the California Light and Power Company for information; we stopped at the offices of the Southern Counties Gas Company for information. We went to the office of The Desert Sun, the local newspaper, trying to ascertain facts that would be of assistance to us in arriving at an estimate of value.

We talked to members in the office of the Chamber of Commerce; we went to the City Hall; we talked to the City Engineer and secured quite a bit of information from the City Engineer. We went to Riverside and we talked to a member of the force of the County Engineer, the County Assessor's [18] office, the Tax Collector's office. We secured considerable information from those sources.

We went to the offices of the Farm Bureau in order to satisfy our minds in regard to topographical conditions, soil conditions, and other factors that might help us in arriving at an opinion of value.

We secured from one of the blueprinting offices a map showing the entire area around Sections 14 and 26.

We interviewed Jack Gray, an aerial photographer. We had him take aerial photographs of the area around Section 14 and Section 26.

We interviewed property owners in Palm Springs. We talked to brokers in Palm Springs; we talked to brokers in Cathedral City and in Indio. Charley Boyle, over at Thousand Springs, Charley Boyle who put Deep Well Ranch on and Smoke

(Testimony of Joseph A. Gallagher)

Tree Ranch, and now has Hidden Springs Ranch north of the highway at Thousand Springs, that is north of Alonzo Bell's property. We talked to brokers at Banning and Beaumont.

We surveyed maps from Riverside County showing all the sections, townships, and ranges in Riverside County, in order to be able to get as close a picture as possible of the general area around our subject property.

We secured what is called by the City of Palm Springs "land measure use map" showing the zoning of properties in [19] Palm Springs. We called at the United States Land Office and secured some maps showing Section 14 and Section 16 and other sections surrounding those two sections.

We also secured from the newspaper office a city map showing the location of the streets in Palm Springs and locations of major buildings, major structures, civic buildings and the like in Palm Springs. We secured a great many listings and information regarding a great many sales of properties in the sections north, south, east and west of Section 14, and the sections north, east and west of Section 26.

What was one of the stronger purposes of this work was this: We took Section 14 and surrounded it with the existing Sections 11 on the north, 13 on the east, 14 on the west, and 23 on the south.

Mr. Preston: You mean 15? You meant 15?

The Witness: No; 23 on the south.

Mr. Preston: You said "14".

(Testimony of Joseph A. Gallagher)

The Witness: 13, 15—thank you. 13 on the east, 15 on the west, and 23 on the south. We averaged the listing prices and the sales prices of properties in those four sections, trying to strike an average of value in Section 14. We went into a comparison of those four sections.

We did the same thing with the sections around 26, that is, Section 25 on the east, 27, and then Section 23 on [20] the north. We went farther out east where several of those subdivisions, new subdivisions, had been established. That would be somewhat north and east, and then a couple of subdivisions directly east.

We had several talks with some of the VA, Veterans Administration appraisers who have appraised that property. I happened to be a Veterans Administration appraiser myself. I have served on a great many panels. We had some talks with some of the men who appraise property, and that is where these subdivisions are, and we secured information which we have used in our report.

Q. By Mr. Clark: I believe you stated that you did interview realtors, local realtors in the Palm Springs area, in reference to the listings and sales of properties there? A. I did.

Mr. Clark: Your Honor, may I inquire of counsel if it would be permissible to counsel, and to the court, at this time to make use of a large map which the Government has had prepared which shows the location of these properties?

The Court: This report you have, Mr. Clark,

(Testimony of Joseph A. Gallagher)

doesn't that summarize the witness' testimony?

Mr. Clark: Yes; it does, your Honor.

The Court: Could it not be stipulated that he will be deemed to have testified on direct as stated in his report, and let the report come in and then conduct such a cross examination as the other side may desire? [21]

Mr. Clark: Your Honor, I appreciate that suggestion very much and I was going to inquire of your Honor about your practice, after I had concluded the qualification, and I have concluded it. Next, I wanted to get a map on the board, and then I was going to ask your Honor if that would be permissible, because we have furnished, as I said yesterday, to counsel for examination a copy of the report and the one they may have to keep for use here will be a complete copy of it.

The Court: Is the map attached to the report?

Mr. Clark: Yes, your Honor; there is a map attached to it, and we have two others that we wanted to put on the board, in large detail, showing the location of the properties which the witness considered as comparable and took into consideration in forming opinions in this case. I think your Honor's suggestion is a very, very good one and it saves a lot of time.

Mr. Brett: If the court please, in connection, first, with Mr. Clark's statement, we have prepared a map and intend to offer it. I would like, however, to have it marked as our exhibit.

Mr. Clark: Yes.

(Testimony of Joseph A. Gallagher)

Mr. Brett: Since we are preparing it. I have no objection to offering it at this time as the Government's first exhibit, and then having Mr. Clark use it. [22]

And as to the second matter, while normally we object to offering the writings that are prepared by experts, because they contain very frequently much that is not conclusions as to value but other statements that would be improper, this being a court trial, we have no objection if—I am not going to be caught with this position: In other words, I understand as a matter of law, if we insist upon the objection, it would be sound. I think I could cite the authorities. But we have also prepared and submitted the reports of our experts, and if it be understood that we are going to have that uniform——

Mr. Clark: Oh, yes.

Mr. Brett: In other words, at my opportunity, I can offer the same type of material, I have no objection.

Mr. Clark: Absolutely, your Honor.

The Court: I understand it is so stipulated.

Mr. Preston: Yes, sir.

Mr. Brett: May the clerk mark our map that Mr. Clark has there as the Government's first exhibit?

The Clerk: Respondents' Exhibit A.

The Court: Is there objection to receiving that into evidence?

Mr. Clark: No; we have not, your Honor.

The Court: Do you offer it, Mr. Brett?

(Testimony of Joseph A. Gallagher)

Mr. Brett: Yes; I do, your Honor.

The Clerk: It will be Respondents' Exhibit A into evidence. [23]

Mr. Clark: We offer, if your Honor please, as Petitioners' next exhibit the report of this witness to which reference has been made, and hand it to the clerk for marking.

The Court: Is there objection?

Mr. Brett: There is no objection, your Honor.

The Clerk: 14.

Mr. Brett: Based upon the stipulation that we have entered into that we reserve the same right at our time.

The Court: Very well.

Mr. Clark: I will hand to counsel——

The Court: Then this report, gentlemen, pursuant to stipulation, will be deemed a part of the witness' direct testimony.

Mr. Brett: That is correct, your Honor.

Mr. Taheny: May I inquire, is that Exhibit 14?

The Clerk: Yes, sir.

The Court: In evidence.

Mr. Clark: May the record show that my associate is now putting together a copy of that report which I am handing to counsel for the Government for their own personal use? They may keep it. It is a complete copy of the one now in evidence. I thought it would facilitate their work.

We offer into evidence, your Honor, after first showing the same to counsel for Lee Arenas, a map

(Testimony of Joseph A. Gallagher)

prepared by this [24] witness in illustration of his testimony.

Mr. Brett: Well, I will object to this offer. I have no objection to it being marked for identification but it contains a great many writings and I do not feel there is any foundation laid for their offer in evidence at this time.

Mr. Clark: May I say there is nothing shown upon this map that is not contained within the report in evidence.

Q. Is that true, Mr. Gallagher?

A. That is right.

Mr. Brett: Upon that statement, of course, I could have no objection. I withdraw my objection.

The Court: It is received pursuant to the same stipulation as Exhibit 14.

Mr. Brett: Yes; as a part of that exhibit. Then I would say, if your Honor please, it is merely an exemplar of that.

The Court: Yes; it is, in truth, a part of the exhibit, is it not?

Mr. Clark: May it be 14-A, then, your Honor, to supplement the exhibit?

The Court: Yes; it will be 14-A in evidence.

The Clerk: The map is so marked.

Q. (By Mr. Clark): Mr. Gallagher, would you take the pointer and step to the board and, by reference to the map, Petitioners' No. 14-A, indicate the properties involved [25] in this immediate hearing, that is, first, the property in Section 14.

A. Section 14.

(Testimony of Joseph A. Gallagher)

Mr. Brett: Your Honor, would you permit me to sit over on this side?

The Court: Yes.

Mr. Clark: Counsel may take my chair. I am not using it. Instead of "14-A" it is 14.

Mr. Preston: That is the Government's map.

Mr. Clark: Oh, yes. I beg pardon. That is right. Thank you very much. That is Exhibit, then——

The Clerk: Respondents' A.

Mr. Clark: A of Respondents'. Thank you very much.

Q. All right, now, if you will do that, Mr. Gallagher.

A. Section 14 I am pointing to with the ruler contains four acres which were the subject matter of our report. Those four acres are divided into two parcels, a two-acre parcel designated as Lot 46 and a two-acre parcel designated as Lot 47.

In Section 26 we have Lot 39, five acres; Lot 40, five acres. In my report I have designated this one as Lot 50, 10 acres; 51, 10 acres; 52, 20 acres; and 53, 40 acres. This latter acreage is located in Section 26 which is one mile south of Section 14.

Q. And about the property on that map is indicated [26] other property, a part of which is in subdivision, is that correct, in accordance with the observations and studies which you have made?

A. That is correct.

Q. May I inquire——

Mr. Brett: I did not quite understand the question. What is that reference to?

(Testimony of Joseph A. Gallagher)

Mr. Clark: Around Section 14 are properties as shown upon this exhibit that are in subdivision, as shown on the exhibit.

Mr. Brett: Outside of——

Mr. Clark: Outside of Section 14.

Your Honor, may I inquire of counsel if he is willing to stipulate that a portion of the property within Section 14, which includes the subject property, has been subdivided, and that I am handing to counsel a photostatic copy of the subdivision plat?

Mr. Brett: No; I am not so willing to stipulate.

Mr. Clark: May I ask counsel, your Honor, this: If he is not informed that the subdivision was made and the plat prepared by Mr. Wadsworth, the allotting agent involved in the proceeding here? That is the fact.

Mr. Brett: I am not so informed. I cannot so stipulate. Your Honor, if counsel means this: Did Mr. Wadsworth, as special allotting agent, prepare some drawing and map, note [27] arbitrary numbers and designate portions of areas within the various sections, I will so stipulate. But the question was: Was there any subdivision, which would mean was there something which was approved by the Secretary of Interior as a subdivision, with the necessary features that go with a subdivision. That I can't stipulate.

Mr. Clark: My information, may it please the court, is that it was approved by the Secretary of Interior.

(Testimony of Joseph A. Gallagher)

The Court: Is what you desire a stipulation as to a map?

Mr. Clark: Yes, your Honor.

The Court: Perhaps if you left off the descriptive language, Mr. Brett would stipulate that what you have is a copy of the map prepared by Mr. Wadsworth.

Mr. Clark: Thank you, your Honor. And I have shown counsel the map for Section 14 which covers the subject property in that section.

Mr. Brett: May I inquire of counsel? Is it your request that I stipulate that this is a drawing that was prepared by Mr. Wadsworth?

Mr. Clark: That is true, the allotting agent, in the course of his allotments under the direction of the Secretary of Interior.

Mr. Brett: If the court please, I am not in a position to do it because I do not know it. I mean I have no way of stipulating. [28]

The Court: Wasn't there such a drawing in evidence——

Mr. Brett: If there was, I did not know it.

The Court ——perhaps in this case or in the other Indian case?

Mr. Brett: There was a map that we brought up in the Belardo case but I was unable to establish it. I think your Honor will remember we were endeavoring to get some determination that there was a street there that people were squatting in and I was not able to establish it. I found out that I was up against a proposition that I could not show ap-

(Testimony of Joseph A. Gallagher)

proval. But that was not this, and I do not want to be captious, but as Government counsel, also representing the Indian, I do not feel that I should stipulate to something of which I have no knowledge.

Now, I do know, and I will so state, that Mr. Wadsworth, Mr. H. E. Wadsworth, was a special allotting agent who was designated by the Secretary of Interior; that he did come down into this area and did make selections for allotments; and that in connection with that he did prepare something to indicate where those selections were. But whether this is the instrument or not, I do not know and I do not know of any provision having been made wherein the Secretary of Interior, to this date, has established any streets any place or any lots by designation officially.

The Court: As to these allotments which were made to [29] Arenas is there a map in the evidence in the case in the main trial?

Mr. Brett: Judge Preston will have to answer that. I do not remember seeing any.

Mr. Preston: I was trying to recall, and I think there is evidence in the record that Mr. Wadsworth took the Government surveyors from Los Angeles down there and surveyed this area and platted it, and there was a description made of each Indian's allotment and it was designated as numbered in this record here, now on this map here, and whether there was an actual map or not, I do not at this moment recall.

(Testimony of Joseph A. Gallagher)

The Court: Isn't it your ultimate purpose to stipulate or to show what land was in fact allotted under the 1927 allotment to Lee Arenas?

Mr. Brett: As to that, your Honor, I understood there is no dispute between us. We prepared the map, and I will stipulate that the two areas which are shown on Government's Exhibit A as 46 and 47 are the so-called townsite areas in Section 14 which were the subject matter of this particular action, **and which have now been held to belong to Lee Arenas to the extent of his having established the fact that he is entitled to a trust patent; and I will also stipulate that the areas which are designated on Government's Exhibit A by the numbers 39 and 40 and which are in Section 26 are the five-acre parcels which are the subject of this action, [30]** that is, I mean the original action of which this is a part, and which are adjudicated as those to which Lee Arenas was entitled to a trust patent; and I will also stipulate that the larger cross-hatched areas which Mr. Gallagher recently referred to as being designated by the numbers 51 to 54, inclusive, and which constitute two 10-acre parcels, one 20-acre parcel, and one 40-acre parcel, all of which are contiguous, are likewise areas which were selected for or by Mr. Arenas and in this judgment in this case were established as being those to which he is entitled to a trust patent. I will so stipulate.

The Court: All of the town lots shown on Exhibit A in Section 14 and the acreage in Section 26, is that it?

(Testimony of Joseph A. Gallagher)

Mr. Brett: That is correct, your Honor.

The Court: Do you accept the stipulation?

Mr. Clark: We accept the stipulation, your Honor. It does not go quite as far as we desire to go, because we desire to show——

The Court: Suppose you offer a further stipulation.

Mr. Clark: Yes, your Honor. I hand counsel a photostatic copy of that which I say is the allotment schedule of 1923, prepared by Mr. Wadsworth as the allotting agent of the Secretary of Interior. I think that this probably is in evidence in the trial of this case before Judge O'Connor, at least a photostatic copy of it, and it makes reference to [31] the lots by number in accordance to the subdivision to which we have referred within Section 14, and includes many lots in addition to those allotted to the Arenas family and adjacent. And we would like to show that this property is not simply an unsubdivided area for any purpose, but in connection with the allotments to the members of that Indian band were subdivided and then given a number in the allotment schedule.

Mr. Preston: Don't you want to refer to this, page 279 of Exhibit 11-A, which is the transcript of the proceedings, and at the trial called the second trial there is a description of the allotments with numbers and everything on it?

Mr. Clark: That is right.

Mr. Preston: That is the testimony of Mr. Wadsworth.

(Testimony of Joseph A. Gallagher)

The Court: Before you submit that to Mr. Brett, perhaps what Mr. Clark has is a photostatic copy of the same document.

Mr. Clark: Then, may I say to counsel, your Honor, that the maps to which I refer are the maps which show the location on the ground of the parcels given numbers in the allotment schedule. Counsel by comparing the same will see that that is true. So I think we ought to have the map in connection with the allotment schedule as applied to the members who are not on the larger map.

Mr. Brett: I think up to this point, at least, I have not been asked to enter into a stipulation. May I just [32] explain this? I do not want to be captious and I do not want to keep anything out of the record that is properly there. We have, as I said, stipulated to these particular designated parcels.

I think this court is both entitled to and would be required to take judicial notice of the records of the court and all decisions that have been made in reference thereto. From that fact I am sure that the court will take judicial notice of the fact that, although originally there were a number of selections actually brought from there, by final decision of the Supreme Court, affirming the Circuit Court, in the one instance, all of the 23 selections have been declared to be void, and therefore as to them they no longer exist. They would not be relevant here.

As to the 27 selections, all except the Arenas one have been held to be void, with one single exception, because in the companion Hatchitt case, which also

(Testimony of Joseph A. Gallagher)

went to the Circuit Court and as to which there was no petition for certiorari made, so that it became final, the Circuit Court again affirmed the Saint Marie judgments held that as to all the other parties in the Saint Marie cases, which are these listed parties, that that judgment was *res judicata*, and therefore necessarily held that those allotments or selections were no longer void.

So that while it is a fact, if the court please, that [33] Mr. Wadsworth made a number of selections, and it is a fact that in the Arenas case there were certain exhibits which listed the various individuals and listed the number of the selections, it is likewise a legal fact that as of this time, which is our date of valuation, the only member of the tribe who has established any right to an allotment is Lee Arenas and these other selections are null and void.

The Court: But, in the state of our record here, haven't we in evidence in this proceeding all the testimony of Wadsworth and all the other witnesses who testified upon the trial?

Mr. Brett: That is correct; yes, sir.

The Court: As well as all the exhibits?

Mr. Brett: That is right. And, of course, I am not attempting at all to preclude that. That went into evidence yesterday. But I understand counsel want me to stipulate to a map. If there was a map in evidence, I am willing to stipulate to it.

I am not being captious. I do not know, your Honor. My own examination of the record, so far as my recollection is concerned, is that there was no

(Testimony of Joseph A. Gallagher)

such map offered, but I may be in error on that.

The Court: Your view is that if it is in the record, the court may take judicial notice of it, of course, but otherwise you are unable to stipulate?

Mr. Brett: I can't stipulate because I know of no such record.

Mr. Clark: All I care, your Honor, is to have the map before the court so it orients and applies to the account of the testimony and affidavits that are already before the court, that is all.

The Court: Are those maps in evidence in any of these proceedings that have been offered?

Mr. Clark: I am unable to say, your Honor. My recollection is——

The Court: Then we are unable to go further with respect to that because Mr. Brett cannot stipulate.

Mr. Preston: That is a map here but I do not think it covers all the area.

The Court: Can't we proceed now?

Mr. Clark: Oh, yes, your Honor, we can. May I have these marked for identification because, perhaps after counsel has compared them and examined them, he would be willing to stipulate, if I may mark them for identification? First, the map as to Section 14.

The Court: The map of Section 14 is what, Exhibit 15 for identification, Mr. Clerk?

The Clerk: Exhibit 15 for identification, your Honor.

(Testimony of Joseph A. Gallagher)

[Printer's Note: Exhibit 15 is set out at page 549 of this printed record.]

The Court: Is there another one, now?

Mr. Clark: Yes, your Honor; the map of Section 26. [35]

The Court: That will be Exhibit 16 for identification.

[Printer's Note: Exhibit 16 is set out at page 550 of this printed record.]

Mr. Preston: There is a fairly accurate map, I assume it might serve some purpose, at 421. It is a map of this Reservation which has the Arenas land marked on it.

The Court: You are referring to a map where?

Mr. Preston: A map in Exhibit 11-B, and the same map is in Exhibit 11-A, which is practically the same thing that we have here.

The Court: Very well. Does this complete the direct examination?

Mr. Clark: No; not quite, your Honor, not quite.

Q. Directing your attention, Mr. Gallagher, to the second map, which is 14-A for Petitioners, I ask you what the colored line running diagonally across the map represents? And would you step to this side so as not to obscure the view of counsel and the court?

A. The colored line represents the wind belt that comes in from the northwest and extends in a southeasterly direction through the Palm Springs area. Property on the west of this red line or the wind

(Testimony of Joseph A. Gallagher)

belt line is out of the wind belt; in other words, no wind storms, sand storms affecting in any drastic way these locations. Property on the east of the red line or the wind belt line are in the wind belt section and are affected by sand storms and by heavy winds. [36]

The reason for that is this: The San Jacinto Mountains come in a direction—I will have to try and describe it as I am talking—the San Jacinto Mountains start in a northerly direction and come along somewhat like this, running east. The Little San Bernardino Mountains are in this area.

Mr. Preston: “This” don’t mean much, Mr. Witness.

A. Those San Bernardino Mountains are north of Section 2 which is one mile north of Section 14. The San Gorgonio Pass is located between the San Jacinto Mountains and the Little San Bernardino Mountains.

The Court: Do the San Jacinto Mountains run to the west and south of the area shown on the map?

The Witness: That is right.

A. And the wind coming down from Beaumont and Banning through San Gorgonio Pass will hit into the mountains, and at about this location there is an elbow in the mountains——

Mr. Clark: Indicating the northeast?

A. The northeast; there is an elbow. That elbow breaks up those heavy winds and disperses them some way, which cause the winds to be deflected east of this red line, which causes the property west of

(Testimony of Joseph A. Gallagher)

the red line to be out of the wind belt section.

That information we have received through a study and also received from officials at Palm Springs and also certain officials in Riverside. [37]

Mr. Clark: Now you may resume the stand. I show to counsel an aerial map or photograph, and is this the aerial photograph to which you testified?

A. It is.

Q. To the best of your knowledge, based upon the studies and observations that you have made, is it a correct aerial representation of the territory shown within it?

A. It is.

Mr. Clark: We offer this in evidence as the Petitioners' next exhibit.

The Clerk: 17.

The Court: Received in evidence.

Mr. Clark: Counsel may cross examine, your Honor.

The Court: We will take the morning recess at this time.

Mr. Preston: Thank you, Judge.

The Court: A five-minute recess.

(Short recess.)

The Court: You may proceed with the cross examination.

Cross Examination

By Mr. Brett:

Q. In your direct examination, Mr. Gallagher, you stated that you had been in Los Angeles for 13 years as an appraiser?

(Testimony of Joseph A. Gallagher)

A. I understood the question to be: How long have [38] you lived at 1337 Edgecliffe Drive.

Q. This organization, American Right of Way and Appraisal Contractors, is a private name that you just adopted after you left the Government service, isn't it? A. That is right.

Q. And that has been continuing about how long?

A. About two to two and one-half years.

Q. I believe, Mr. Gallagher, that so far as his Honor is concerned and the counsel who are here, that we are probably informed as to these various areas that you have referred to in stating the scope of your work, but, for the record, in order that others might have some information of it in connection with your Department of Water and Power work, which you said was in the early thirties, was there any part of that work that was in the immediate area of Palm Springs?

A. No, sir. There was considerable work across the desert in comparable and typical desert lands in Nevada, coming in from Boulder Dam to Los Angeles, as we approached Los Angeles from Boulder City.

Q. Just as a matter of calculation, approximately how far from the location of Palm Springs was this work that you conducted in connection with the Boulder Canyon power line, that is, what was the nearest point in that work that came to the circumference of the area which we describe as Palm Springs? [39]

(Testimony of Joseph A. Gallagher)

A. Well, I should say San Bernardino. We hit in west of San Bernardino with the Boulder Canyon transmission line. San Bernardino, I believe, is about 39 miles from Palm Springs, approximately.

Q. And they are separated by a range of mountains? A. Right.

Q. Your answer is "yes"? A. Yes, sir.

Q. You referred to LaVina. LaVina is up in Mono County? A. Yes, sir.

Q. Up in the mountains to the east and north of Los Angeles some 300-odd miles?

A. Yes, sir.

Q. And would, therefore, be approximately 400 or 410 miles minimum air line from Palm Springs, wouldn't it? A. Yes, sir.

Q. Now, you stated that you were a right of way field agent and that you were a project manager for the United States Engineers' office at Los Angeles during World War II?

A. I do not believe I stated I was a right of way agent. I stated I was a project manager for the U. S. Engineers' office.

Q. In that work you were a negotiator and supervisor of others who made negotiations, is that not correct? [40] A. Yes, sir.

Q. Such appraisals as were made were made by other persons, either personnel who were employed as appraisers by the War Department directly as salaried appraisers or by individuals who were hired in each separate instance and whom, to iden-

(Testimony of Joseph A. Gallagher)

tify them from the others, we will call independent appraisers, is that correct?

A. In a great many instances, yes; in some instances, no. The office asked me to run an appraisal on Lomita flight strip after one of the office appraisers had made an appraisal. That I did.

Q. Now, let us stop there just a minute. Lomita flight strip is down in the southwest area of the Los Angeles metropolitan district?

A. Yes, sir.

Q. And approximately how far is it air line from Palm Springs?

A. Palm Springs is approximately 109 miles from Los Angeles. Lomita, I would say, is about 19 miles; it would be about 128 miles.

Q. You referred also to the Metropolitan airport. Where is that Metropolitan airport located?

A. In Van Nuys, California.

Q. That, then, would be even a longer distance from Palm Springs than Lomita flight strip, is that correct? [41]

A. Van Nuys is 109 miles—Los Angeles to Palm Springs—and Van Nuys, I should say, about 14 miles to the location of the Metropolitan air strip, which would be 123 miles.

Q. Then you also referred to Bolsa Chica acquisition by the United States for the Navy Department?

A. If I said "Navy" I was in error. It was for the U. S. Army.

Q. And that was an area that is below Hunting-

(Testimony of Joseph A. Gallagher)

ton Beach in the area that was formerly used by the Bolsa Chica Gun Club?

A. Yes, sir.

Q. That is separated by a range of mountains from the Palm Springs area? A. Yes, sir.

Q. And would be approximately how far from Palm Springs?

A. Approximately 130 miles.

Q. That particular area included actual beach frontage right down on the Pacific Coast Highway, and also areas that were immediately adjacent but on a bluff immediately above the Pacific Coast Highway, is that not correct? A. Yes, sir.

Q. How long were you with the War Department?

A. I believe about three and one-half years. [42]

Q. And how many appraisals in all did you make during that period?

A. May I enumerate some of those appraisals?

Q. Well, can you give us the approximate number without enumeration?

A. There were a great many locations where there were single family residences, and then there were locations where acreage was involved. Even the adobe house, that old adobe house at San Diego I ran an appraisal with two of the employed appraisers by the U. S. Engineers on that. I should say, oh, a dozen to 15.

Q. Now, summarizing those, Mr. Gallagher, what would you say was the nearest in point of air line miles to the area of Palm Springs?

(Testimony of Joseph A. Gallagher)

A. Of the appraisals we have just talked about, made for the U. S. Engineers, made for the United States Government?

Q. Yes, sir.

A. Between 110 and 120 miles I should say.

Q. You testified to having made some appraisals in connection with the proposed widening of Foot-hill Boulevard; that was in the immediate environs of the City of Pasadena? A. Yes, sir.

Q. And that, too, would be at least 90 miles away from Palm Springs? [43]

A. I should say approximately 90 miles.

Q. Then you referred to certain appraisals made for property owners of Pismo Beach at San Luis Obispo, and that is approximately 250 miles from Los Angeles, isn't it? A. Yes, sir.

Q. You also referred to making some appraisals for the Hollywood Freeway at Sunset and Figueroa and at Vernon Avenue. I presume that is not for the Hollywood Freeway, but my notes indicate some of Vernon Avenue.

A. City, city widening.

Q. Those are appraisals of projects in the metropolitan area, the City of Los Angeles?

A. Yes, sir.

Q. Now, you mentioned that you made or had something to do with a sanitary or sanitation sewer line in Montebello. Was that an appraisal?

A. I represented the property owners whose property was affected by the sewer line going through Montebello. These property owners were on

(Testimony of Joseph A. Gallagher)

Telegraph Road just east of proposed Slauson Avenue.

Q. And approximately how far is that in air line miles from Palm Springs?

A. I should say about a hundred miles.

Q. Now, you mentioned two dam site appraisals of the Matilija and Casitas, I believe you said,— is that right, [44] the Casitas? A. Yes, sir.

Q. Those were what county?

A. Ventura County.

Q. In air line miles how far would they be from Palm Springs? A. About 173 to 175 miles.

Q. Those are up in broken areas in the mountains?

A. Yes, sir. However, there is a considerable level land besides the mountain land in those dam sites.

Q. Now, you next testified about having done some work in connection with the big inch gas line for two of the local gas companies, starting at the Colorado River east of Blythe and proceeding to Santa Fe Springs. That was a right of way acquisition?

A. Right of way and buying acquisition both. Primarily for rights of way.

Q. And approximately what width?

A. 20 feet.

Q. In considering that entire line what was the nearest point of that line to the community known as Palm Springs?

A. We hit in south of the highway at White-

(Testimony of Joseph A. Gallagher)

water. I should say Whitewater would be about four to five miles north of Palm Springs. We hit on both sides of the [45] highway at Garnet. Indian Avenue through Palm Springs comes out at the highway at Garnet. I should say about five miles.

Q. Do you recall what value you fixed on acreage in that area?

A. Yes; I believe I have an idea as to what the value was around Whitewater. That is where we had the wash. Land values were not too high there at the wash of Whitewater because they had quite a few flash floods and there were a great many engineering complications that the gas companies were confronted with in the construction of the line in that particular location. I believe they had to call in some of the engineers from Caltech to assist them or to advise with them. I might be wrong on that. The engineers from Caltech—I think I am right. But they called for advice for engineering to help them over new engineering problems at Whitewater.

At Garnet we did not run into many problems, except the wind. There was a considerable wind problem around Garnet, considerable wind problem between Garnet and Charley Boyle's property over at Thousand Palms, just north of Alonzo Bell's property. I have been there where you could hardly see in front of you for a distance of 50 feet during the sand storms.

Q. Now, may I just summarize my view of what you have [46] just said and then you tell me

(Testimony of Joseph A. Gallagher)

whether it is correct or not: That after the matters that you have just described coming to your attention—and I notice you deem those particular localities in no wise comparable to these properties that are here under consideration? A. Yes, sir.

Q. Is that a correct statement?

A. Yes sir.

Q. So that particular work and investigation, then was not helpful to you in arriving at an opinion of the value in this particular case?

A. That particular location, I should say no.

Q. You mentioned that you graduated from Notre Dame. In what activity. I mean what type of degree did you get?

A. MA, Master of Arts.

Q. Now, you did mention that you had made a survey of the Palm Springs area in connection with the pipe line right of way acquisition.

A. Yes sir.

Q. And my notes indicate that you said that you took in an area approximately two or three miles on either side of the line. Is that correct?

A. A general area in the appraisal of the property for rights of way two to three miles on each side of the line is correct. Around cities we took an area that ran possibly, [47] oh, six to nine miles of the line, and not necessarily on both sides but in the developed country.

Q. When was it you made this Palm Springs survey in connection with the big-inch pipe line?

A. 1946.

(Testimony of Joseph A. Gallagher)

Q. Is that when you had the aerial photograph taken? A. No, sir.

Q. Without going into too much detail, tell us what you mean when you say you made a survey of Palm Springs in 1946 in connection with the big inch pipeline; just what did you do?

A. Well, I was trying to. At the time that we were ready to run our line or to construct our line we were following The Edison Company that had constructed a line through there. We were following the telephone company that was then constructing or getting ready to construct the co-axial cable, and we ran into quite a few complications. I was asked by certain members of The Edison Company whether or not I hit the \$5,000 an acre man. I said, "\$5,000 an acre man—who is he or where is his property located?" "You will soon find out."

Some of the boys of the telephone company asked me whether or not I ran up against the man that wants \$5,000 an acre. They would not tell me who this man was nor where his property was. [48]

So, in my investigation, trying to ascertain where there was someone who would ask around \$5,000 an acre for a right of way, or on the basis of \$5,000 an acre for a right of way, I was studying those properties. I knew it was not east of Blythe or east of Indio, because properties east of Indio, in my opinion, did not have a value anywhere near that value. It must have been some place between Indio and possibly Banning or Beaumont.

We were coming in north of the highway. In try-

(Testimony of Joseph A. Gallagher)

ing to discover what values were I consulted with the manager of the Alonzo Bell property which is one of the finest grape lands, I guess, that we have in the State of California, and that is east of Blythe or west of Indio. I conferred with several property owners there where the date palms are. In other words I was stretching myself out in order to find out what some of these values were and when I did hit up with this property owner I would know what I was confronted with.

We naturally were hitting in close to Banning, and so I ran the investigation as I say, just as far apart, the line, as far apart of the highway, south of the highway, as I possibly could in order to get a good estimate of value in there because I knew I would have to appear in any case the gas company might have that might go to condemnation, which I did.

Q. Did you find the \$5,000 land? [49]

A. I did.

Q. Where was that located?

A. At Thousand Palms, Charley Boyle.

Q. Where is Thousand Palms with reference to Palm Springs?

A. Thousand Palms is at the north end of Ramon Road where Ramon Road crosses the highway.

Q. Mr. Gallagher, I think in your direct examination you referred to the north end of Ramon Road. Does not Ramon Road run east and west?

A. Yes. East. I beg your pardon. It is east. That is right.

(Testimony of Joseph A. Gallagher)

Q. How far is Thousand Palms from this area?

The Court: Do you mean from the Palm Springs area?

Mr. Brett: From the Palm Springs area.

A. Oh, I should say about four and one half miles.

Q. And did that line run through Thousand Palms?

A. North of Thousand Palms; yes, sir.

Q. I notice throughout your testimony you have referred to "we," and so forth. In making this particular investigation respecting the properties that are here under consideration was this data accumulated by others and then considered and utilized by you, or did you yourself obtain the data?

A. It was accumulated by myself and by other members of my company. [50]

Q. How many all told aided in the accumulation of data? A. One.

Q. Who is the one? A. My son.

Q. In other words, then, it was accumulated either by your son, Joseph Gallagher, Jr., or by you? A. Yes, sir.

Q. And I believe you said that you then personally checked the material before it went into the report as to its accuracy? A. Yes, sir.

Q. Do you mean by that that you examined notes that were taken by both of you to be sure that it was properly embodied, or do you mean by that, that you checked the source of information that was obtained except by yourself?

(Testimony of Joseph A. Gallagher)

A. I checked both the source and also the report that was turned over to me.

Q. You stated that you had made some appraisal for Bob Hope?

A. Yes sir.

Q. When was that made? A. 1946.

Q. What was the subject matter of that particular appraisal? [51]

A. Bob Hope is interested in Palm Springs, very much interested in Palm Springs. Bob Hope is interested in having a broadcasting station at Palm Springs. He has already bought two houses at Palm Springs. His wife had never invested any money in real estate and she was interested in making an investment at Palm Springs.

I called Culver Nichols' office and asked him to find some property there that I might present to Deolores Hope. Culver Nichols turned it over to a Mr. Hoover in his office. He located three lots. Mrs. Hope bought those lots for \$15,000. The approximate square-foot area was around 18,000. They were in Section 15. Bob has asked me——

Q. I did not ask you what he asked you.

A. I beg pardon.

Q. That was the subject matter, then, of the appraisal?

A. That is right; yes, sir.

Q. Three lots in Section 15?

A. And then for a location for a broadcasting station.

Q. All right. Where was that located?

(Testimony of Joseph A. Gallagher)

A. We have not found a location as yet.

Q. Where in Section 15 were those lots located, Mr. Gallagher?

A. I should say about a thousand feet west of Palm Canyon Drive in Las Palmas tract.

Q. Can you point them out on either of these maps [52] and indicate their locations?

A. I do not have the numbers of the lots clear in my mind at this time. This is Section 15—or Section 10. These three lots were in Section 10 of Las Palmas tract. They are located, I believe on Verbena, Verbena Road or Verbena Del Road, right in this general area.

Q. You can't identify the specific lots?

A. Not now; no, sir.

Q. That area that you have just referred to is one of the earliest areas of homesites in Palm Springs, is it not? A. Yes, sir.

Q. And it is surrounded by very substantial homes? A. Yes, sir.

Q. Ranging in value of approximately what?

A. Oh, I should say \$25,000 to \$125,000, maybe more than that.

The Court: That area is north and east of the so-called Arenas lots in Section 14?

The Witness: I should say, your Honor, north and west.

The Court: I should say north and west, also. North and west across what road or street or highway is it?

The Witness: Across Palm Canyon.

(Testimony of Joseph A. Gallagher)

The Court: That is the main street of Palm Springs?

The Witness: Yes, sir. [53]

The Court: How far would it be between the Arenas lots in Section 14 from those three lots, the Hope lots?

The Witness: I should about a mile and a quarter.

Q. (By Mr. Brett): And you say that those lots sold for how much money?

A. \$15,000.

Q. Apiece or——

A. Three of them.

Q. Three of them; \$5,000 apiece?

A. Yes, sir.

The Court: How far would the Hope lots be from the post office of Palm Springs?

The Witness: About three-quarters of a mile.

The Court: How far are the Arenas lots in Section 14 from the post office?

The Witness: Well, about a quarter of a mile, if that far. May I say something else about those three lots?

The Court: You may.

The Witness: Before those lots were out of escrow Hoover called me and told me he had a doctor in Laguna Beach who was interested in the lots and would pay \$30,000 for the three lots. I asked Mrs. Hope whether or not she would sell and she said, "No." The deal was still in escrow at the time.

Mr. Brett: If the court please, there was no pos-

(Testimony of Joseph A. Gallagher)

sible [54] way I could anticipate that. I object to it and move to strike it as hearsay.

The Court: Motion granted.

Would you point out for me on the map there where the Oasis Hotel is, where it would be on Exhibit A?

The Witness: No, I could not, your Honor. I do not know just where the Oasis Hotel is.

Mr. Preston: It is south of Desert Inn.

The Court: Can you point out where the post office would be or The Desert Inn?

The Witness: Well, The Desert Inn is just about in here, and the post office——

The Court: You are referring to a point on the red line which is the main street of the town?

The Witness: This is Palm Canyon Drive.

The Court: And almost due west of the Arenas lots?

The Witness: Yes, sir.

The Court: Where are the springs, the bath houses?

The Witness: The bath houses are just—— they are on Indian Avenue.

The Court: That would be a block east of the main street of the town?

The Witness: A block east; that is right.

The Court: And how far from the Arenas lots?

The Witness: I should say about 700 feet, 700 to a [55] thousand feet.

Mr. Brett: Do we have a red pencil here? Had you completed, your Honor?

(Testimony of Joseph A. Gallagher)

The Court: Yes.

Q. (By Mr. Brett): Would you be kind enough, Mr. Gallagher, to indicate on the map your recollection of the location of The Desert Inn, upon Government's Exhibit A, and your recollection of the location of the bath house on Exhibit A?

A. I do not have the location of The Desert Inn very clear in my mind, but I believe that would somewhat describe the location.

The Court: How have you marked it? How have you identified it?

The Witness: I have an "X," your Honor, on Desert Inn. I have it just north of Tahquitz, Tahquitz Drive, right in that general area of Tahquitz Drive.

The Court: You mean on the west side of Palm Canyon Drive?

The Witness: Yes, sir.

The Court: How have you identified the bath house?

The Witness: Indicated that by an "X," which would be on the east side of Indian Avenue between Arenas and Baristo Roads.

Q. (By Mr. Brett): Would you be kind enough to mark [56] the two indications that you have made—Desert Inn as "A" and the bath house as "B"?

(Witness marking on Government's Exhibit A.)

Q. You understand, Mr. Gallagher, that this written report that you made to counsel has been

(Testimony of Joseph A. Gallagher)

received in evidence as a part of your testimony in chief? A. Yes, sir.

Q. Now, you have not stated orally any valuations or identification of valuations, but in this report you have disclosed, on page 15——do you have a copy of the report? A. Yes, sir.

Q. ——that your estimate of fair market value of what you designate as Parcel A and describe as Lot 42 and what you designate as Parcel B and describe as Lot 47 is each in the sum of \$40,000?

A. Yes, sir.

The Court: Before you proceed——

Q. 42, as I understand it, is in reality 46—— oh, pardon me, your Honor.

The Court: Before you proceed, let us ask the witness if the figures stated on page 15 of Exhibit 14 and the valuations, as well, summarized on page 22, state his present opinion as to the fair market value of the lands there described. [57]

The Witness: Yes, sir.

Q. (By Mr. Brett): I referred to page 15 as to Parcel A which is described here as “Lot 42.” You intended “46,” did you not?

A. 46, yes, sir; 46.

Q. Those, in other words, are the two contiguous parcels that are located in Section 14?

A. Yes, sir.

The Court: Is it stipulated, gentlemen, that figure may be corrected on the original Exhibit 14?

Mr. Preston: So stipulated.

(Testimony of Joseph A. Gallagher)

The Court: To read "Lot 46 of Section 14," instead of "Lot 42 of Section 14"?

Mr. Clark: We do, your Honor.

The Court: Do both sides so stipulate?

Mr. Brett: So stipulated; yes, your Honor.

The Court: I will make that correction in ink.

Q. (By Mr. Brett): Now, Mr. Gallagher, on page 1 of this report you state that the "appraisal is made for the purpose of determining attorney's fees" and "for the purpose of estimating its fair market value as of current date." Did you intend thereby to distinguish in your mind or in the estimates that you were making a difference in values for the two purposes therein mentioned?

A. My only thought was to establish a value which, in [58] my opinion, was a fair market value of the property, and the purpose of the assignment to make the report was to enable the court to establish what the attorneys' fees would be.

Q. Now, I direct your attention to the fact that on the pages 14 and 15 you state that you gave consideration to seven separate forms of value, the first being "Neighborhood Value"; the second being "Sale Value"; the third being "True Value"; the fourth being "Utility Value"; the fifth being "Fair Cash Market Value"; the sixth being "Use Value"; the seventh being "Value for Subdivision Purposes." Did you intend by said description to indicate that you were concluding that the property had separate and distinct values for those purposes that I have just described? A. No sir.

(Testimony of Joseph A. Gallagher)

Q. What is your personal definition or description of what you conceive to be and utilize in your definition of "Fair Market Value"?

A. A market value is the highest price in terms of money which property will bring when offered for sale in the open market, allowing reasonable time to find a purchaser who buys with full knowledge of the uses and purposes for which the property is adapted or for which it is capable of being used.

Q. You have referred in your oral testimony and you [59] Annex in the written report as the last drawing, to the fact that there existed at the time of your inquiry and at the date of your valuation a certain zoning ordinance of the City of Palm Springs; and you have attached, as I have stated, a copy of the map indicating the locations wherein those zoning requirements apply, is that correct?

A. Yes, sir.

Q. Will you kindly examine the document that I—

Pardon me just a moment. I understand, under the rules, the clerk should mark for identification, so at this time I will ask that a map which bears the title "Official Land Use Plan—City of Palm Springs California" be marked for identification as Government's exhibit.

The Clerk: B.

The Court: Respondents' Exhibit B.

The Clerk: Respondents' Exhibit B for identification.

(Testimony of Joseph A. Gallagher)

The Court: It is offered on behalf of both respondents, I take it?

Mr. Brett: Yes, sir; that is correct.

Will you please examine Respondents' Exhibit B for identification and state whether or not that is a copy of the document you referred to in your oral testimony and a copy of which is in your report?

A. Yes, sir.

Mr. Brett: May I place this on the easel? [60]

The Court: Do you offer it in evidence, Mr. Brett?

Mr. Brett: Yes; I desire to offer it in evidence at this time.

Mr. Preston: There is no objection.

The Court: Very well, Respondents' Exhibit B for identification is received into evidence.

Q. (By Mr. Brett): Did you assume for the purposes of your investigation and in drawing your conclusion that these zoning requirements would apply to the hypothetical purchaser who would acquire the property at the value which you have fixed?

A. I believe all zoning locations are very necessary to be considered in determining and arriving at an opinion of value; and this new zoning at Palm Springs is something which went into effect in 1947. I believe it was September of 1947, and after properties were rezoned, property took a valuation in locations somewhat in excess of what the valuations were previous to the time of that zoning.

The Court: Did you consider that zone in arriv-

(Testimony of Joseph A. Gallagher.)

ing at your estimate which you have given us as your opinion?

The Witness: Yes, sir.

Q. (By Mr. Brett): In other words, that was one of the elements that went in to make the total figure which was your conclusion as to value?

A. Yes, sir.

Q. Now, you have indicated in your report that you [61] gave consideration to "neighborhood value" and make the statement on page 14 that "value of property depends upon neighbors. The neighborhood is in the stage of integration." When you referred to the fact that the neighborhood is in the stage of integration just what do you mean?

A. That the neighborhood is in the stage of improvement.

Q. And what neighborhood were you referring to?

A. To the properties in the four sections surrounding Section 14 and in three sections surrounding Section 26.

Q. In fixing your estimate of value did you take into consideration the present adaptability of the property? A. Yes, sir.

Q. I assume, then, that your valuation that you have made here is on the conception that this hypothetical transaction would be between a fee seller and a fee buyer without restrictions?

A. Yes, sir.

Q. Well, now, in connection with that conception——

(Testimony of Joseph A. Gallagher.)

The Court: "Without restrictions"—do you refer to the zoning restrictions or to the title restrictions?

Mr. Brett: I am referring to the title restrictions.

The Witness: That is right; my answer is "yes, sir" to that.

Q. (By Mr. Brett): In other words, you did not give [62] consideration to the fact that that particular property, as well as the other parcels which are the subject matter here, are vested in the United States of America and that there are very definite legal restrictions upon either conveyance or encumbrance of the property?

Mr. Clark: Just a minute. I desire to interpose an objection to that question upon the ground that it assumes that the title is in the United States of America.

The Court: Sustained. Did you assume that your hypothetical buyer would acquire an unimpaired fee simple title to the property?

The Witness: Yes, sir.

Mr. Brett: Did I understand your Honor sustained the objection?

The Court: I sustained the objection to the question. I think the witness has testified to what you want to know. He says that he has assumed that this hypothetical buyer would acquire an unimpaired fee simple title to the land. I take it that throughout we are dealing with the full ownership, aren't we?

The Witness: Yes, sir.

The Court: That is what you dealt with?

(Testimony of Joseph A. Gallagher.)

The Witness: Yes, sir.

Q. (By Mr. Brett): Now, Mr. Gallagher, what did you assume with reference to all of the lands which are immediately [63] contiguous north, east, south, and west of the parcels which are shown on the Respondents' Exhibit A as numbers 46 and 47; that is, did you assume that those lands, likewise, were freed of any title restrictions; were such that any person could develop them without restriction and without limitation, or did you assume that those lands, as distinguished from parcels 46 and 47, continued to be owned by the United States and subject to complete restriction as to either sale or encumbrance or any development other than as approved by the Secretary of Interior of the United States?

Mr. Preston: I object to the use of "ownership by the United States."

The Court: Sustained. What you are asking him, Mr. Brett, and what you want to know is laying zoning restrictions aside, did he assume that the buyer would have a full and unimpaired fee simple title to this property and, hence the right to use it and enjoy it as he saw fit.

Mr. Brett: I am afraid, your Honor, that that is not my question. I can, of course, have it reread or I will explain it.

The Court: I understand your question.

Mr. Brett: My question is this: I want to know whether this witness, in fixing the value, considered the legal situation as it exists, which is that all of

(Testimony of Joseph A. Gallagher.)

this other land surrounding it on every point in that section is owned by [64] the United States, is tribal lands.

The Court: Why don't you ask him if he considered it was tribal land? But for us to get into the calculations of this witness as to the quality of the title held by the United States, it seems to me to be irrelevant. He has stated that he assumed that his hypothetical buyer would be just like any ordinary buyer, would acquire a full and unimpaired fee simple title, and by that, to lay zoning restrictions and other restrictions imposed by governmental agencies to one side.

Mr. Brett: I understand that.

The Court: We are speaking of the impediments in the title, and he said that he assumed there were none except for zoning restrictions, and, as I understand it, any restrictions that might be imposed by governmental agencies.

The Witness: Yes, sir.

Mr. Preston: That is true, your Honor, as to parcels——

The Court: That covers the restrictions, doesn't it?

Mr. Brett: No, sir.

The Court: Whatever restrictions you have are covered by law or by governmental agency.

Mr. Brett: I do not believe that it does, your Honor, if you will permit me. What I am now examining him on is not as to these particular parcels. He has answered that he has this conception,

(Testimony of Joseph A. Gallagher.)

which, of course, has to be hypothetical. [65]

The Court: Let me go one step farther, then. Perhaps we can save some time.

Did you make the same assumption in dealing with and arriving at your opinion as to the value of the surrounding properties?

The Witness: Yes, sir.

Q. (By Mr. Brett): Including all of the areas that are in the Indian owned sections?

A. Yes, sir.

Q. Then, I take it that, as a part of that assumption, you assumed that the remaining portion of Section 14 which is contiguous to parcels 46 and 47, at the date of your valuation were available to being purchased and sold by private parties and developed by private parties in the same manner as the lands which are at present private owned and lie within the boundaries of Sections 11, 13, 23, 10, 15, 27, and 25?

A. I assumed that the same conditions existing on parcels 46 and 47 would be the conditions existing under the same circumstances on other parcels throughout section 14.

The Court: You call them "parcels"; you are referring to lots?

The Witness: Lots. [66]

The Court: 46 and 47 of Section 14?

The Witness: To lots. Thank you, Judge.

Mr. Brett: I submit, if the court please, that that is not an answer to my inquiry of the witness. I will ask that the question be read.

(Testimony of Joseph A. Gallagher.)

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. My answer to that is yes, sir.

Q. (By Mr. Brett): Did you personally investigate on the ground both the property which is described on Respondents' Exhibit A as lots 46 and 47 and the remaining portions contiguous thereto and lying within section 14?

The Witness: Would you mind repeating the question, please?

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. Yes, sir.

Q. (By Mr. Brett): Will you state to the court briefly what you discovered as to the nature of the improvements and the type and character of occupancy, that is, the description of the people who were occupying it, that you discovered from that investigation?

A. I discovered that those buildings took on the nature of shacks; that the property was undeveloped, was not properly developed; that people living in the buildings, [67] there were quite a few colored families and there were quite a few other families living there. I took all that into consideration and made a recommendation in my report as to what I thought should be done.

The Court: That is all covered, I think, Mr. Brett, at the bottom of page 8 and the top of page 9 of Exhibit 14.

(Testimony of Joseph A. Gallagher.)

Mr. Brett: I think that is true.

Q. And that recommendation was that the Indians and the Negroes and the people of low income, generally, who were occupying this miscellaneous assortment of buildings which you have described as "shacks" should be removed from the premises and the entire section 14 put to a higher utility?

A. I believe that the report shows that there is no racial prejudice whatsoever in that recommendation of mine.

The Court: Did you assume, in arriving at your opinion, that the property would be put or was available to be put to the highest and best and most efficient possible use?

The Witness: Yes, sir.

The Court: Does that cover the situation?

Mr. Brett: No; it does not, your Honor, because I am referring——

The Court: It is not helping me, Mr. Brett. It may help some higher court, but it is not helping me, this line of questioning. It is all in the report here. [68]

Mr. Brett: I always hesitate to either abandon or——

The Court: What is it?

Mr. Brett: What I want to get at is this, your Honor: I want to find out—and maybe I can ask it in one question.

Q. In fixing your value of 46 and 47 did you fix it in the light of the fact that you are assuming that either the purchasers thereof themselves could

(Testimony of Joseph A. Gallagher.)

control the rest of this area and clear it out, or that other facilities, either the city or other developers, could clear that area from its present more or less slum appearance, could put in streets, could put in sanitation, and could improve the other contiguous areas in Section 14 the same as has been done in the white owned sections outside of Section 14?

A. I assumed that it could be done or should be done.

Q. That is, you fixed the value in the light of that condition and assuming that the purchaser who would acquire the property at your valuation would be able to have the benefits of such a development of the entire section?

A. I have fixed my value on the assumption that the present use is not the proper use. I fixed my value under what I consider to be the highest, best and most profitable use of the property in Section 14.

Q. Well, let me ask you this question:

I don't think that answers the question, your Honor, and I will try another. [69]

Did you fix your value, assuming that someone would pay \$20,000 an acre for these parcels if the remaining sections continued exactly as you saw it, or did you fix it only assuming that such a purchaser or others with whom he might co-operate could change the conditions as you recommended?

A. I will have to answer your question just the way you answered that of mine, that I did not consider the present use to be the proper use, but I

(Testimony of Joseph A. Gallagher.)

gave my opinion of value as to the highest and best use that the property is adapted for.

The Court: Did you assume that all the property in Section 14 and all the property in its vicinity was available in the market to be bought and sold and put to its highest and best and most efficient possible use?

The Witness: Yes, sir.

Mr. Brett: I think that answers my question.

Q. And that was the basis, then, of your ultimate conclusion which you have fixed at—what is it, \$20,000 an acre? A. \$20,000 an acre.

Q. Now, let me ask you this: Assuming, instead of the predicate which you have just stated, that Lots 46 and 47 could be released of all governmental restrictions—and by that I am not referring to the zoning restrictions of the City of Palm Springs—but would be subject to those zoning restrictions, but also assuming that as to the [70] remainder of Section 14 the conditions would continue as they now continue and would not, insofar as the purchaser was concerned or insofar as the public making up the community known as Palm Springs was concerned, be subject to any control or change, would that change your opinion as to the value of parcels 46 and 47?

A. I could not possibly assume, Mr. Brett, that an exception would be made for subject parcels and the rest of the property be sort of penalized.

The Court: Mr. Gallagher, assuming that Lots 46 and 47 are free and available for unrestricted

(Testimony of Joseph A. Gallagher.)

use, unrestricted buying and selling, as you have assumed in arriving at your valuation now assumed, and also that the remainder of section 14 is tribal Indian land which is under the control of the United States Government, the Department of the Interior, as to use and is unallotted Indian land belonging to the tribe, and hence can only be used for the purposes for which it is now being used or for some other purpose which might be approved by the Secretary of Interior, would that affect your opinion as to the value of Lots 46 and 47?

A. No, sir. No, sir.

Q. (By Mr. Brett): What do you find to be the zoning requirements as to parcels 46 and 47 under the zoning ordinance of the City of Palm Springs, and assuming that those lots were free from restrictions and passed into the [71] hands of a private purchaser?

A. I think proper zoning for this should be—
The Court: What is the zone?

The Court: What does that mean?

The Witness: R-1 is single family residences.

Q. (By Mr. Brett): And what area is required under that zoning ordinance?

A. For Indian land, 7500 square feet.

Q. And how many square feet are there in Lots 46 and 47?

A. You have two acres; 43,560 square feet to an acre times two. You are up to around 80—well, 43,560 times two, 89,120.

Q. Now, take 7500, dividing that by 7500, ap-

(Testimony of Joseph A. Gallagher.)

proximately how many homesites could be placed under this R-1 single-family residence zoning within that area?

A. Well, I believe that, using that square-foot area of 10,000, we can get about 4.74 houses to an acre.

The Court: Under this restriction you would get about 11, would you not?

The Witness: That is right.

Q. (By Mr. Brett): 11 houses, then, in that area. And they are single-family residences. That would be the restriction, and what value range?

The Court: Do you mean what cost is specified in the range by the ordinance? [72]

Mr. Brett: Yes; what value cost range is specified in the ordinance?

A. Oh, \$15,000 up to \$25,000.

Q. Do I understand, Mr. Gallagher, that it is your opinion that, as of this date and assuming that all the lands surrounding Lots 46 and 47 are still vested in the United States in trust for this Indian tribe, and is not subject to be sold or liened or to be otherwise used than it is at the present, excepting subject to the approval and control of the Secretary of Interior—it is your opinion that purchaser, knowing those facts, having in mind that all the area contiguous thereto is surrounded by small building, some of which you have described as shacks, resided in by Negroes and by Indians and by whites and others of rather limited financial ability, and that the purchaser would have no means

(Testimony of Joseph A. Gallagher.)

of controlling this contiguous area and would be required to erect no more than 11 single-family structures, each of which would at least have to cost a minimum of \$15,000, and would have no way at this time of knowing when, if at all, a change would be made in the contiguous area, that having those facts in mind the hypothetical seller would be able to sell to that hypothetical buyer these two lots comprising four acres for cash at \$20,000 per acre?

A. May I indicate——

Mr. Brett: If the court please, I think it would be [73] proper——

The Witness: The question is such a long question.

Mr. Brett: Pardon me just a moment, Mr. Gallagher. I think it would be proper at this time to request, at least, that he answer yes or no and then give his explanation.

The Court: What you are asking him is if these assumptions you have named change his opinion, is that it, or would he still say under those assumptions it is worth \$20,000 an acre?

Mr. Brett: I suppose that is one way of stating it; yes, sir. I accept the amendment.

The Court: Do you understand the question? Would you still say under those assumptions that the property is worth \$20,000 an acre?

The Witness: Yes, sir. May I explain my answer?

The Court: Yes.

A. We not only have R-1 zoning, but we have

(Testimony of Joseph A. Gallagher.)

C-2 zoning on Indian Avenue. 150 feet east of Indian Avenue and for a distance of 200 feet east of the westerly line of that C-2 zone, we have R-3 zoning. R-3 zoning will be running into multi-units. We have E-2 zoning in there. E-2 zoning would be for guest ranches. We have T zoning, which is for trailer camps, and these trailer camps are making a tremendous amount of money now.

I think I am tied down to too tight a position there [74] in that answer of mine, because these other zone areas are in Section 14. I think that they should be considered. I am trying to consider them in answering the question.

Q. (By Mr. Brett): First, I will ask you this: None of the zonings which you have referred to, to-wit, the business zoning which is immediately adjacent to Indian Avenue, the R-3 zoning which is a small strip that lies just back of the business zoning on the borders of Indian Avenue, or the trailer zoning which you have referred to, affect or apply to Lots 46 or 47? A. That is right.

Q. Well, now, did you in your investigation, either personally or through consultation with counsel, ascertain that the then existing and present existing restrictions on the use of all of Section 14 was limited to revocable permits that could be revoked within 30 days?

A. I hope I am answering your question correctly. As I got it, I gave no consideration whatsoever to the rentals received from the buildings or the existing structures. I consider those rentals to

(Testimony of Joseph A. Gallagher.)

be poor business, poor management. I think the property should receive a rental far in excess of what it is receiving. I think that for a great many reasons.

Q. Now, just a minute, Mr. Gallagher.

Mr. Clark: He is not through yet. [75]

Mr. Brett: I submit that is not an answer to my question, your Honor, and I do not desire to have him go on. My question did not ask that. I asked him if he considered the status that actually exists.

The Court: He said "no" several times, as I understand his testimony. His opinion is based upon the assumption that all this land is available and is to be used—that is, not only the *lost* 46 and 47, but the surrounding territory in Section 14 is available to be put to the highest and best and most profitable or most efficient use. Isn't that correct, Mr. Gallagher?

The Witness: Yes, sir.

Mr. Brett: Then I have no further questions on that point, if that is his testimony.

The Court: Are you about finished?

Mr. Brett: Sir?

The Court: Are you about through?

Mr. Brett: No; I am not, your Honor.

The Court: I am adjourning for the day.

Mr. Brett: I appreciate that, but there are other matters here.

Mr. Clark: The witness will return, your Honor, of course.

(Testimony of Joseph A. Gallagher.)

The Court: That is not helping me any, but you may wish it for your record. [76]

Mr. Brett: I never wish anything for the record. I wanted to go into some of his properties here and show what they consist of and show his manner in arriving at his opinions. Do I understand that that will not help your Honor?

The Court: It won't help me. It is all here in his report.

Mr. Brett: Well, I think, your Honor, it needs some development, and I am not sure that your Honor could——

The Court: We can spend days on this, and what it all adds up to is one man's opinion.

Mr. Brett: That is true. But, your Honor, sometimes we have to realize——

The Court: I do not wish to limit you, Mr. Brett. If you wish to proceed, you may do so. I am merely indicating that to me this is a very minor phase of this proceeding. I expect to hear the expressions of opinion.

Mr. Brett: I understand.

The Court: But once the property is described and the circumstances are described, it is just as helpful to me if the witness sat down and said: My opinion of the value of this property is X dollars, and let it stand, because we are going to undoubtedly have some very wide differences of opinion as to the value of this property.

Mr. Brett: There is no question about that. Your [77] Honor is aware of that and I believe——

(Testimony of Joseph A. Gallagher.)

The Court: All right. Mr. Gallagher has told us what his values are. He has put them down in this voluminous Exhibit 14. What is to be gained by going over it and over and over again? He has demonstrated that he has that same opinion throughout your examination. He has not changed it at all.

Mr. Brett: That is true, your Honor. And at least I would like to find if he had the same conception as to the other lands, as a basis for the motion to strike. And there are a couple of other factors that I would like to get in. I wanted to go into more detail, but I think if you have the opportunity to assistance of counsel to see what this is made of, it will be helpful. Now, if you say it won't, however, I do not want to take the court's time.

The Court: You mean you wish to cover it as to the other property.

Did you make the same assumptions with respect to all this Arenas property?

The Witness: Yes, sir.

The Court: All the property which you testify you have given us your opinion as to value of?

The Witness: Yes, sir.

Mr. Brett: May I make this query, then, if the court please: If it should develop that at the argument in [78] connection with this value, that certain factors are not clear, may I have leave then to ask Mr. Gallagher to come back for further examination?

The Court: I do not wish to limit you now, Mr. Brett. I merely offer that suggestion because we can

(Testimony of Joseph A. Gallagher.)

spend days on this question of value. My present view of the matter is that that is a very minor phase of this matter.

Mr. Brett: You mean the present value?

The Court: Yes. It would be very difficult to show me that it would be wise for me to attempt to make an award predicated upon the present value of this property. If an award is made, I would be inclined to make it on the basis of percentage, which would rise or fall with the valuation of the property.

Mr. Brett: That is true. But, of course, then as an incident would have to be what is the value that we have to get to. I mean that is the cornerstone of whatever we are taking a percentage of.

The Court: Yes; it is helpful to know whether we are dealing with a million dollars or a thousand dollars. That is very helpful in determining a percentage.

Mr. Brett: Your Honor, I am going to abide by the court's suggestion, but I would like to ask just two more questions and then I will close on this matter, if I may. I want to ask one other phase of his methods. [79]

The Court: I do not wish to limit you, Mr. Clark suggests Mr. Gallagher will come back. And we will recess at this time until 9:30 tomorrow morning.

(Whereupon, a recess was taken until 9:30 o'clock a.m. of the following day, Thursday, February 12, 1948.) [80]

Los Angeles, California

Thursday, February 12, 1948, 9:30 a.m.

(Case called by the clerk.)

The Court: You may proceed.

Mr. Clark: Your Honor, may I suggest that we learned over the adjournment that there had been omitted from Exhibit 14, the Gallagher report, the copy of the zoning map of Palm Springs containing his notations upon it which should be a part of it. May I present it to the clerk?

The Court: Is there objection?

Mr. Brett: May I ask Mr. Clark a question, if the court please?

The Court: Yes.

Mr. Brett: Do I understand that the map which is in the copy that you delivered to me is not in the one that is the exhibit?

Mr. Clark: That is right; the zoning map.

Mr. Brett: Then there would be no objection.

The Court: Than that map, the zoning map, will be received into evidence and marked Petitioners' Exhibit 14-B.

Mr. Brett: If the court please, I understand that that exhibit was to be received—I am referring now to the appraisal report, and therefore I take it that this is, too—merely as a portion of this man's testimony or as illustrative of his testimony? In other words, I do not [81] want to be stipulating to evidenciary matter there, but merely that it is a part of his testimony.

The Court: It is my understanding that it is

offered for the purpose that you stated, merely to supply a portion of the direct testimony of Mr. Gallagher.

Mr. Brett: With that understanding, I have no objection.

Mr. Preston: 14-A is also a map, is it not, your Honor?

The Court: This was Exhibit 14, the Gallagher report, and is in reality now composed of the book, Exhibit 14, a map, Exhibit 14-A, and the map just now admitted, the zoning map, Exhibit 14-B, all admitted into evidence for the same purpose.

When does the trust patent expire here by its provisions and terms?

Mr. Brett: In May of 1952; is that not correct? Wait just a moment.

Mr. Preston: May the 9th, 1927 plus 25 years.

The Court: That would be May 9, 1952.

Mr. Brett: Which is correct.

Mr. Preston: But Mr. Brett, I think, contends that the time has already been extended, don't you, to '62 or '67? The President, every so often gives a general order extending these restrictions, and it is in the briefs here contended by Mr. Brett, I am sure, that this particular [82] restriction has been extended another period.

The Court: Mr. Brett asked some questions yesterday to which I sustained objection due to the form of the question, without suggesting they could be reached in another manner. I had in mind asking Mr. Gallagher if his opinion would be different if he assumed that there was such a trust patent.

Mr. Brett: I expect to go into that, your Honor.
The Court: Very well.

Mr. Brett: However, of course, I do not want to preclude in any way the court's questioning.

The Court: No. I just wanted you to know that I was not precluding that type of cross examination in my ruling.

Mr. Brett: Yes, sir. I desire to have the clerk mark a document, a printed document that I will hand him. The pages are unnumbered, but it bears the heading on the first page: "Ordinance No. 180 Palm Springs Land Use Ordinance" as the respondents' next exhibit for identification.

The Clerk: C for identification.

Mr. Clark: We are willing, your Honor, if it suits the convenience of court and counsel, it may be received in evidence.

Mr. Brett: Then I will offer it in evidence.

The Court: Is that the zoning ordinance of Palm Springs? [83]

Mr. Clark: Yes, sir.

The Court: Respondents' Exhibit C for identification is received into evidence.

JOSEPH A. GALLAGHER (Recalled)

Cross Examination (Resumed)

By Mr. Brett:

Q. Mr. Gallagher, throughout your report you used the term "valued at" or "having a value of", and, upon having an opportunity to examine——

Your Honor, I do not see any record of this map. I will have to look at my notes.

(Testimony of Joseph A. Gallagher.)

The Court: That map is Exhibit 14-A.

Mr. Brett: Is that 14-A.

Q. —Exhibit 14-A, I note that a substantial part of the notations which are set forth thereon with reference to numbers that are in circles state that the value is based on the assessment. First, I will ask you: These notations on Exhibit 14-A that are in handwriting are notations that were either placed there by you personally or under your supervision? A. By me personally.

Q. And the numbers which are in the circles are the same numbers that you listed in your appraisal report, which is Exhibit 14, under the heading of "list of Comparables" and being on pages 23 to 25, inclusive, is that not correct? [84]

A. There is quite a variance in the numbers in the map that is under exhibit at the present time and the numbers stipulated in the appraisal report. I do not think the two of them would wholly correspond. I put those numbers in certain instances and in the majority of instances they do. I indicated or I marked those numbers on that map so that in case you have asked any questions regarding my method of information, that I could point to it and point to it in a hurry; so that what you have in the appraisal report, the numbers there may not exactly correspond with the numbers on that map, though I believe I can tie the map right into the appraisal report without too much difficulty.

Q. We won't take time for that. I will ask this question: Is it a fact and am I therefore correctly

(Testimony of Joseph A. Gallagher.)

interpreting your report, that a substantial number of the values which you have set forth in your report as comparable properties is based upon the assessment rolls of those properties to which you have applied some percentage in arriving at the total value? A. That is correct.

The Court: What percentage did you assume the assessed value was to the total value?

The Witness: The information that we received from Mr.— [85]

The Court: No. What did you assume?

The Witness: 15 to 20 per cent. Property is assessed on a 15 to 20 per cent of its valuation.

Q. (By Mr. Brett): Now, in making your calculations for the purpose of determining the average value per acre of the white owned sections of land which bounded the Indian section on which you were making your valuation in this case did you utilize the computations that you made in that manner?

The Witness: Would you repeat the question, please?

Mr. Brett: Perhaps I can make it simpler rather than repeating it, because I want you to thoroughly understand it.

Q. You have testified orally and you have set forth in several places in your report that in fixing the value of the two parcels numbers 46 and 47 which are in the Indian section 14, that you arrived at that valuation per acre in the sections which immediately surround that, that is Section 11, Sec-

(Testimony of Joseph A. Gallagher.)

tion 15, Section 23, and Section 13, as applied to Section 14. Now, my question is: That having those statements in mind, in arriving at your conception and conclusion as to the average acreate value of these surrounding sections did you use the valuations which you arrived at through first obtaining the assessments and then applying your mathematical percentage? [86]

A. Is that a yes or no answer? May I have a——

The Court: Answer it any way you please, Mr. Gallagher. Please let us move on. Did you multiply them by five, the assessed valuations by five?

The Witness: Yes, sir.

The Court: Is that the way you arrived at your opinion as to the value of the surrounding property?

The Witness: Yes, sir.

Mr. Brett: Now, one other question on that line and that is all on that.

Q. Did you use the over-all assessment for each parcel?

A. What do you mean by the over-all assessment?

Q. Well, in other words, you have shown in your report a number of these properties were improved, some were vacant. Now, did you take the assessment, for instance, if it was an improved property, the over-all assessment value?

A. I took the assessed value on land and improvements, the over-all assessment.

Q. The over-all assessment? A. Yes, sir.

(Testimony of Joseph A. Gallagher.)

Q. Then, this one new question: In that respect, as I understand it, Section 15, for example, that is the very heart of the business section of Palm Springs, is it not? A. Yes, sir. [87]

Q. It contains such properties as The Desert Inn, Bullocks, Robinson's, the bank, motion picture theatre, etc., doesn't it? A. Yes, sir.

Q. And you then lumped the total assessed value of those improved properties in figuring your average acreage value of Section 15? A. Yes, sir.

Mr. Preston: Section 14?

Mr. Brett: Section 15.

Q. In fixing your acreage value, then, for the section just north of Section 14, which contains the El Mirador Hotel, a number of new hotels along Indian Avenue, properties such as Harold Lloyd's property and Charles Farrell's home, you took the over-all assessment of the lands and improvements, lumped them together and then figured an average acreage value? A. Yes, sir.

Q. Mr. Gallagher, in your report as to the acreage in Section 26 you determined that that 10 acres and 20 acres which was, I believe—let me get the numbers—which you have shown on your report, on page 22, Mr. Gallagher, if you refer to it, as Parcels E and G? A. Yes, sir.

Q. Now, you have arrived at a conclusion that those [88] 30 acres had a fair market value as of today of \$12,000 per acre? A. Yes, sir.

Q. Now, let me ask you: Did you find in your entire research in this area in any of the sections

(Testimony of Joseph A. Gallagher.)

that are shown on the respondents' map, Exhibit A, any unimproved—by that I mean no dwellings or other type of improvements on it—30-acre parcel or 20-acre parcel or 10-acre parcel which was sold in either of those three units for \$12,000 an acre?

A. Yes; I believe I did.

Q. Can you tell us where you found it and what parcel it is and the size of it?

A. There are so many parcels that I have there that just an individual parcel is not coming to me. However, if Lot 7, Block 2 in the Winterhaven Manor tract—no; that was a sale. I beg your pardon.

Q. Mr. Gallagher, maybe I have not made myself clear, but I want to make myself clear so as to be fair to you. I am not asking whether you found any separate lots or one or two lots which sold at an average price as far as the lot is concerned for computing in that acreage. What I want to know is did you find any vacant acreage, not improved, that was either in a total amount of 10 acres as a unit or a total amount of 20 acres as a unit, or in a [89] total amount of 30 acres as a unit which, in one sale, brought \$12,000 per acre?

A. I do not believe I can answer that question, Mr. Brett. I know I found some of those lots, but I cannot just at this time point out the exact location of those lots without making a little study of it. But there are some on that map that are similar in valuation to the \$12,000 value that I put on that particular acreage.

(Testimony of Joseph A. Gallagher.)

Q. And had that much acreage as a unit?

A. I believe so.

Mr. Brett: May I request, if the court please, that after the witness leaves the stand, if he can find any such this morning and from his record, that he supply them so that we could have it?

The Court: You may. But I would remind counsel, again, that this is not a condemnation action. We are spending a lot of time here on something that does not help this court. It may help some other court.

Mr. Brett: Well, I realize that and I am not going to take but just a little bit more time. I had that condemnation in mind, but I feel, your Honor, in fixing value one of the elements is to be able to find something that is either sold in such an acreage or that approaches it. I do not think that we find anything anywheres near that anywhere. [90]

The Court: That may all go to the weight and you can urge it in argument. I appreciate the temptation to cross examine this witness in extenso. If this were a common condemnation action I would not make any remarks about it at all.

Mr. Brett: I see. Well, the thought that I had in mind——

The Court: I have no intention of fixing the value of this property at a precise figure.

Mr. Brett: Oh, I see. Well, I did not realize that.

The Court: The most I have in mind finding—and if I do conclude that I must find specifically, I will re-open the matter, if necessary—but the most

(Testimony of Joseph A. Gallagher.)

I intend finding is that the value is in a range.

Mr. Brett: I see.

The Court: Approximately.

Mr. Brett: May I have just the privilege of making this statement? The thought I had in mind is this, your Honor: As Mr. Clark brought out in his opening statement and also 'through the witness, the witness' own conception had made a wide range of study. His report does not disclose the facts that I am asking here, and I want to find out if in this compendium of study he did find any transaction which has direct relation to the conclusion that he has reached.

The Court: He has in effect said that he has not, as [91] far as he knows.

Mr. Brett: That is right. And, of course, I am stopping as soon as he has said that he has not. Then I want to ask him on a couple of other values and then I will stop as far as that is concerned.

Q. Now, Mr. Gallagher, as to the 10-acre parcel just immediately to the east of the 10-acre parcel which was your No. E, and the 40-acre parcel which is immediately east to the 20-acre parcel which was your No. G, you have placed a valuation as your estimate of the fair value of \$9,500 per acre.

A. That is right.

Q. In your entire study were you able to find any unimproved land which lies within the area that is illustrated on Respondents' Exhibit A, either as a 10-acre parcel or as a 40-acre parcel or as a 50-

(Testimony of Joseph A. Gallagher.)

acre parcel, that is, in either of those three units, which was sold at the rate of \$9,500 per acre?

A. I have found acreage listed for more than \$9,500 an acre several miles east of Section 26 out near Mirage tract.

Q. And in what unit?

A. Well, there is a 160-acre parcel there that is owned by one of the executives of the Bendix Manufacturing Company. [92]

Q. Have you found any sales at any such prices of any units in the size that I have just described?

A. My answer is yes. Culver Nichols had some acreage in Section 11, I believe it is Block 69 in Section 11. That is north of Section 14. He submitted that acreage to me for \$6,500 an acre. He thought maybe Mr. Hope might be interested——

The Court: Do not go into all of that, Mr. Gallagher. Did it sell for that or not?

The Witness: No. My client would not buy it.

The Court: Are you about finished?

Mr. Brett: I have just one more question and this is the close.

Q. Mr. Gallagher, in your computations as to average per acre, if you will look at page 19, you will find that as to Section 23 your value per acre average is fixed at \$29,000; is that not correct?

A. Yes, sir.

Q. That is cited in relation to your computations respecting the small parcels that are in Section 14, is that not true? A. Yes, sir.

(Testimony of Joseph A. Gallagher.)

Q. Now, if you will examine your report on page 22? A. I have it. [93]

Q. Do you find that? A. Yes, sir.

Q. You state up above that, in fixing the valuation of the larger parcels, which are the major portion of your total values that are in Section 26, you likewise considered the average value of Section 23 as one of the surrounding sections, and in that instance you fix the average value, instead of \$29,000, at \$33,000; is that not correct?

A. Yes, sir. I predicated that upon the sales in the south half of Section 23 and listings which were in excess of sales, and listings in the north half of Section 23, which was the reason for the differential between the \$29,000 and the \$33,000. The comparables in sales on the exhibit map will indicate that.

Q. In other words, then, depending on which section that you were applying it to, you arrived at the value in your computation?

A. I do not quite understand that question.

Mr. Brett: I will withdraw it. That is all.

Mr. Taheny: Your Honor, might I ask one or two questions.

The Court: We will call the 10:00 o'clock calendar first, Mr. Taheny.

(Interruption for other court proceedings.)

The Court: All right, Mr. Taheny.

Mr. Taheny: Your Honor, in view of the court's remarks, [94] I realize that there is no necessity for cross examination of this witness, but there is one part of your Honor's remarks that I did not

(Testimony of Joseph A. Gallagher.)

understand. I think you said or you mentioned that you intended to deal in a range or some such word. That is beyond me.

The Court: I said I did not intend to bind or attempt to bind these parties by an adjudication of the precise present value of this land.

Mr. Taheny: That is what I understood.

The Court: I do not see that it is necessary. I may be in error in that. If counsel think I am, I will hear from you.

Mr. Taheny: No; I do not disagree with that, but you used an expression I did not quite understand.

The Court: I said, "range". I said that if I make a finding as to the value of the land, it will be within a range. I may find its approximate value between X dollars and Y dollars.

Mr. Taheny: I understand.

The Court: If I have to make some finding with respect to approximate value. I do not see any necessity of making a finding as to the precise value.

Mr. Taheny: Your Honor, I would like to ask just one or two questions.

The Court: Haven't you read his report? [95]

Mr. Taheny: I have read his report, yes.

The Court: You know what value he has placed.

Mr. Taheny: I would like to know what he means by this. [96]

Cross Examination

By Mr. Taheny:

Q. In your report you place a value of \$1,047,000

(Testimony of Joseph A. Gallagher.)

on this property, but you qualify it in respect to the condition of title, do you not?

A. Yes, sir.

Q. That is, your valuation, is it of the land in the trust patent condition?

A. I assume the title is vested in Lee Arenas under trust patents issued in accordance with the final judgments of the United States District Court at Los Angeles.

Q. What would be your value if it were in fee simple?

A. In fee simple would be the same.

Mr. Taheny: That is all.

The Court: If you assumed, Mr. Gallagher, that this property was held under a trust patent until 1952, in May, which would preclude Lee Arenas from encumbering it or hypothecating it——

The Witness: I assumed that.

The Court: ——or transferring it in any way, and would preclude the attempted purchaser from having any control over the operation of the property, that being in the Department of the Interior, would that affect the opinion you have given?

A. No, sir. [97]

The Court: If you assumed that the title to the property was so placed and was conditioned, and that the President of the United States had the power to extend indefinitely the period of that trust patent, and hence extend indefinitely the restrictions upon alienation, incumbrance, and upon operation, would your opinion be affected by that?

(Testimony of Joseph A. Gallagher.)

The Witness: Yes, it would, your Honor.

The Court: To what extent?

The Witness: Well, I assume this—to what extent? It would alter the valuation, in my opinion.

The Court: To what extent?

The Witness: Possibly 40 per cent. Now, if I may——

The Court: Decrease it approximately 40 per cent?

The Witness: Decrease it.

The Court: Would that be true if you assumed the President had the power to extend that trust limitation which I have described for a period of 10 years?

The Witness: I would say yes.

The Court: Would it be the same if you assumed a longer period, say, 25 years?

The Witness: Yes.

The Court: Any further questions, gentlemen?

Mr. Preston: I think not.

Mr. Brett: Your Honor, pardon me. I want to say this [98] simply because I realize that I committed an error. I said, your Honor, I would interrogate on those matters, and then I got concerned and did not. And I would like to apologize for making a representation I did not carry out, but your Honor has examined, so it is all right.

The Court: I assumed by my pressure upon you that you had overlooked it.

Mr. Brett: I would either like to ask, myself, or have your Honor ask if the witness would be of the

(Testimony of Joseph A. Gallagher.)

same opinion if he also assumed that during the period of this restriction the property not only could not be sold, but no one could borrow on the property or otherwise encumber it for the purpose of improving it, because that limitation also exists as part of the limitation.

The Court: Did you so assume in giving your answer?

The Witness: I did.

The Court: I intended to cover the restrictions, the alienation and question of supervision, and also the restrictions upon the use of the property and operation of the property.

Mr. Brett: I realized as a lawyer that you did, and I was not sure that the witness so understood it or that the record so showed.

The Court: He is an expert. Did you so understand, Mr. Gallagher? [99]

The Witness: I did, your Honor.

Mr. Preston: If the court please, may I offer a word of explanation? We have proceeded upon the theory that the contracts in this case contemplate a valuation of the property free from any restriction, and that is the reason that we have put forth this particular testimony, on the theory that is a valuation of the property free from restrictions. That is our interpretation of the contract.

The Court: Do the petitioners contend, Judge Preston, that it will be necessary for the court to find out the precise value of this property?

Mr. Preston: Well, we have sat here thinking,

(Testimony of Joseph A. Gallagher.)

your Honor, and I have been puzzling ever since court adjourned yesterday. I figure that, from your statement, the court must have in mind fixing a percentage of the property.

The Court: As I understand petitioners' contention, it is that they are entitled to a legal fee based upon the quantum meruit of the determination of the value of their services, and then the rest of it would be—that can be determined either dollarwise or percentagewise.

Mr. Preston: From what you said yesterday I had concluded that you had thought of percentage.

The Court: That is what I intended to convey.

Mr. Preston: That would require a partition of the lands between the petitioners and Lee Arenas; and I have no [100] objection to that kind of a determination of the case if it is found proper to do so. But I want it understood that our valuations, as we take them, are to be placed upon the land as though it were absolutely unrestricted, because this court is not bound by any restriction that the Government may have upon this land.

The Court: You mean as of this time?

Mr. Preston: That is right; in the fixation of these fees the court is not bound by the restrictions. The restrictions are in effect waived or non-existent. When the court, sitting as a court of equity in this case, fixes these fees and fixes the method of their collection, that is an equitable trust under the Anglin and Stevenson cases, and I think they are undoubtedly sound. Because this fee arises, this

(Testimony of Joseph A. Gallagher.)

claim arises because of the failure of the Government to do its duty and this Indian was thrown on the country to find a lawyer or lawyers. He has found them and the Government is bound by what this court does, and the restrictions on this land haven't a thing in the world to do with the collection of their fee.

Upon fixing it, you can, of course, go into these matters if you like, but as for collection of this fee, there are no restrictions on this land, is our contention, and we think that it is amply borne out.

The Court: The thought I intended to convey was this: [101] As I view it, assuming an award is to be made, it would be manifestly unwise to lay upon this property a fixed sum of money in view of the type of property it is and the uncertainties as to what disposition may be able to be made of it in the future.

Mr. Gallagher, in your opinion, would the values you have given us apply to, say, May of 1952; would they be at least that much?

The Witness: I think the values in 1952, your Honor, may be somewhat less than they are in 1948. I believe we are running into a sort of a leveling in real estate values.

The Court: Would you be able to express an opinion percentagewise as to how much of a decrease, in your opinion, would occur between now and May 9, 1952 in the fair market value of this property?

(Testimony of Joseph A. Gallagher.)

The Witness: I do not think it will exceed 28 per cent less in 1952 than it is today.

The Court: You are referring, of course, to the Lee Arenas property?

The Witness: Yes.

Judge Preston: 20 per cent or 28 per cent?

The Witness: 28 per cent.

Mr. Brett: If your Honor please, I am mindful of the fact if we establish the rule in this case at the commencement of the case or thereabouts, that if one counsel who [102] represents the respondents made some statement or drew some conclusion, that the other was bound unless he expresses the fact that he did not agree.

You asked Mr. Taheny whether it was agreeable to the Government that the property not be valued, but that you merely fix a general range and then fix fees upon that basis, and he said that he agreed, as I understand.

I want it understood as far as I am concerned that I do not feel that that is proper. I do not want to argue the matter, but I want to briefly state this: The Government is still contending, and at least until this case is closed, that the 10 per cent contract applies.

We hope, when we get our evidence on, to show evidence which will convince the court that the quantum meruit of the contract is void and does not apply. And secondly, I think that, as Judge Preston pointed out, necessarily in applying either it will be required that the court in some manner find and

(Testimony of Joseph A. Gallagher.)

determine what the parties meant when they referred to a percentage of the value.

The Court: Let me interrupt you, Mr. Brett.

Mr. Brett: Surely.

The Court: I do not want to keep the parties and attorneys here in this other case unnecessarily.

Mr. Brett: Surely.

The Court: Will you call the case, Mr. Clark?

(Interruption for other court proceedings.)

The Court: Mr. Brett, I interrupted you.

Mr. Brett: I shall be brief, but my thought is this: That the first contract, page 5 thereof, specifically says that:

“Said ten per centum compensation shall be upon the basis of the reasonable market value of the said property as of the date of the completion of said litigation, but in no event shall be less than the value as of the date of the signing of this agreement.”

And the second contract, if effective, according to the testimony that is in the Interrogations, was a supplement or addition thereto upon the basis that the additional problems required an additional compensation.

The Court: Isn't it your view that the February 1, 1945 agreement, which is Petitioners' Exhibit 5 here, supersedes—that Petitioners' Exhibit 7 supersedes and modifies to the extent that it is inconsistent with Exhibit 6, Petitioners' Exhibit 6, the agreement of November 20, 1940?

(Testimony of Joseph A. Gallagher.)

Mr. Brett: I believe, if the court please, that if you find that it is an effective contract, it supercedes it to this extent: That in place of fixing 10 per cent, it fixes on the quantum meruit, and otherwise I think it would have to apply to that same valuation. In other words, I do not [104] think it is a complete novation or an attempt to abandon the entire contract.

Of course, as I stated, the Government hopes to be able to establish that this document which is 7 is void and is not the controlling agreement in this case.

The Court: Perhaps I am too hasty in limiting you. We must go into this question of value, then, because apparently it might be material—not only the value as of now, but the value as of any date on which the litigation can be said to have ceased or been completed. It would also be material to know the value as of the date of the signing of Exhibit 7, the 20th of November, 1940.

Mr. Brett: I think that is true, your Honor. And I would also point out to the court that under the decisions, both of the State of California and the decisions of the Federal Court, probably the latter in this instance would control in this type of proceeding. I am referring to the Sanitary District of Chicago case which is in 149 Fed. (2d). I do not have the page reference.

The court squarely holds—and the United States Supreme Court denied certiorari—that in fixing a valuation you have to fix it in the light of the con-

(Testimony of Joseph A. Gallagher.)

ditions that exist as of the date of valuation, particularly as to both what its adaptability and its actual ability of use is at that time.

That particular case, for example, turned on the fact [105] that, although potentially certain property might be used if certain changes were made, it could not be used at that time because of existing conditions; and the trial court accepted the potential theory, on the theory that it was possible, even probable, that it could be changed, and the Circuit Court reversed and the Supreme Court sustained it.

So that I feel, in this case where the contract, if you happen to hold that the 10 per cent contract is the valid one, where it specifically says in language that the valuation is to be as of the date of the completion of litigation or as of the date of the contract, that we have to have our testimony in the light of the conditions that existed at that time, and not in the light of what might take place at some other time or under some other conditions.

The Court: We might have to have a valuation as of several different dates.

Mr. Brett: That is correct, your Honor.

Mr. Preston: I suggest this, if your Honor please: Either one of two things occur, and that is, that we either decide to try the issue now as to the validity of the second contract, or have it understood that the case may be reopened in the event the court later holds that the second contract was inclusive. In either event that would move us along.

(Testimony of Joseph A. Gallagher.)

The Court: Yes. Well, let us see if we can cover it [106] in all these periods now.

Mr. Gallagher, the opinions you have given us as to the value of this property in question as to the date of your report, December 9, 1947, would those same valuations apply, in your opinion, throughout the year 1947?

The Witness: Yes, sir.

The Court: And would apply today?

The Witness: Yes, sir.

The Court: And have you an opinion as to the value as of the 20th day of November, 1940?

Mr. Preston: We would have the right, would we not, to waive that point, because the contract provides that it be valued as of the termination of the services, but that it cannot be any less than it was in 1940. That puts 1940 in a doubtful column, because we will admit that in 1940 it was not worth as much as it is now or as much as at any time in 1947.

The Court: But the opposing expert in this proceeding puts the value way below what they, themselves, might admit it was in 1940. Conceivably it would be less, in their opinion, today than it was in 1940.

Mr. Brett: I will check. I do not think that is true, but maybe we can save time.

Mr. Preston: I think we can stipulate that the value was greater and is greater; that it was greater in 1947 and is greater now than it was in 1940. [107]

Mr. Brett: We are prepared to stipulate, if the

(Testimony of Joseph A. Gallagher.)

court please, that the value, under any form of assumption of facts, that is, whether you value it as a trust patent or a deed or otherwise, in 1940 would be less than the value as of today; so, as Judge Preston says, that eliminated that feature.

Mr. Preston: That is acceptable.

The Court: Very well.

Mr. Brett: I would, however, like the privilege of getting in there a part of the witness' answer to the court. As I understand it, your Honor asked the witness, and he did give a valuation of his conception, if you take the trust patent theory. I mean he fixed the different per cent. I was not making a note. Didn't he say it would be 40 per cent less, in his opinion?

The Court: If the President has the power to extend the existing trust patent by as much as 10 years, I understood Mr. Gallagher to state in his opinion that would depreciate the value to the extent of 40 per cent. Is that correct?

The Witness: Yes, sir.

Mr. Taheny: Your Honor, the remarks of Mr. Brett, I believe, called for a statement of the position of the undersigned as the personal counsel for Mr. Arenas. In his answer Mr. Brett denies the execution of the 1940 contract by Mr. [108] Arenas. Mr. Arenas is here to testify that there was a contract for 10 per cent, as far as Mr. Arenas personally is concerned, and he does not challenge the legality in any way of the 1940 contract for 10 per cent.

(Testimony of Joseph A. Gallagher.)

The Court: He does challenge the validity of the subsequent agreement on February 1, 1945, Petitioners' Exhibit 7.

Mr. Taheny: Yes; he denies that. He denies the validity of the 1945 agreement; and I would like to have understood, your Honor, that Mr. Arenas personally takes that position in this trial.

The Court: Any further questions of Mr. Gallagher?

Mr. Clark: We have none, your Honor.

Mr. Preston: Yes, we have.

Mr. Brett: Respondents haven't any further questions.

The Court: You may step down.

The Witness: Thank you, your Honor.

The Court: Petitioners' next witness.

Mr. Clark: Just a moment, your Honor. Judge Preston has a question.

Mr. Preston: Just one question.

Q. (By Mr. Clark): Mr. Gallagher, in your opinion, is the land here involved situated in section 26 susceptible of independent development economically for the purposes for which you have testified?

A. In my opinion—— [109]

Mr. Brett: To which we object as neither part of the redirect nor as proper direct examination.

The Court: Overruled.

A. In my opinion, it is susceptible to future development. It has a 90-acre parcel there. 90 acres are ample for subdivision development or development of any particular subdivision nature.

(Testimony of Joseph A. Gallagher.)

Mr. Clark: That is all. May we call Benton Beckley, your Honor, as the next witness. [110]

(Page 158, line 19, to page 168, line 19):

BENTON BECKLEY

called as a witness by Petitioners, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Benton Beckley.

The Clerk: Spell your last name, please.

The Witness: B-e-c-k-l-e-y.

Direct Examination

By Mr. Clark:

Q. Where do you live, Mr. Beckley?

A. I live in the City of Palm Springs.

Q. How long have you resided there?

A. For the past 11 years.

Q. In what business are you engaged?

A. In the real estate business.

Q. Are you licensed as a realtor under the laws of the State of California? A. Yes, sir.

Q. How long have you held such a license?

A. The past four years.

Q. Are you the owner of any real property situated in Palm Springs? A. Yes, sir.

Q. Where is it located and what is its type?

A. It is located in the center of the section of both these pieces that Lee Arenas owns.

Q. And on what street or streets?

A. It is on State Highway, the south part of Palm Canyon.

(Testimony of Benton Beckley.)

Q. And what type of property is it?

A. It is C-2 business property.

Q. Is it improved for that use?

A. It is improved for that use.

Q. Did you purchase that property?

A. I purchased it two or three years ago.

Q. And have you in the practice of your profession kept in touch with sales and listings of properties within the Palm Springs area?

A. Yes, sir.

Q. How frequently have you made sales of properties within that area?

A. Well, we made two or three sales at least every month, and more.

Q. That has been true throughout the period of your holding a license as a realtor in California?

A. Yes, sir.

Q. And what types of properties have been involved in those sales?

A. All types of property, both Indian and Public [112] owned properties.

Q. Have you also informed yourself during that period of time as to the asking prices of properties within that area?

A. Yes; I have.

Q. Are you familiar with the properties involved here, situated in sections 14 and 26?

A. Yes, sir.

Q. And have you been familiar with those properties throughout the period of your residence in Palm Springs?

A. Yes, sir.

Q. Have you had anything to do with the sale or

(Testimony of Benton Beckley.)

listings of properties owned by white persons comparable in location and in condition and in utility to these particular properties? A. Yes, sir.

Q. Have you collaborated with Mr. Joseph A. Gallagher in the preparation of his report, Exhibit 14 in evidence here? A. I did.

Q. You have seen it, examined that report since its completion on the 9th day of December last?

A. Not the completion folder, but I have worked with him in Palm Springs on acquiring what he has in his subject matter.

Q. Have you formed an opinion as to the reasonable [113] market value of the land so involved here situated in section 14, comprising four acres?

A. I have.

Q. What, in your opinion, on the 27th day of August, 1947 was the reasonable market value of those lands?

A. I believe the figure that he did set, close to a million dollars, would be very accurate, sir, at today's value.

Q. That is in Section 26, too?

A. Yes, sir.

Q. Is that based upon your study and your experience as a realtor in that area and owner of property there?

A. That is right, according to the location.

Mr. Clark: Cross examine.

The Court: You have heard the testimony of Mr. Gallagher?

The Witness: Practically all except the first day,

(Testimony of Benton Beckley.)

your Honor. I was not here. I was absent the first part of it.

The Court: Did you hear his expression of opinion of the effect of the trust patent?

The Witness: That is right, your Honor.

The Court: Would your opinion be the same?

The Witness: The same.

The Court: You heard all the testimony he gave this [114] morning?

The Witness: Yes, sir; practically all, the first part.

The Court: Your opinion coincides with his given here this morning?

The Witness: That is right, your Honor.

The Court: And the opinion you have given applies to all of the year 1947?

The Witness: That is right.

The Court: That is all I have.

Cross Examination

By Mr. Brett:

Q. Mr. Beckley, in arriving at your conclusion did you use the same method of approach that has been described by Mr. Gallagher?

A. Approximately the same approach, by the sale of property adjoining this property in the Palm Springs area and the location of it.

Q. Did you specifically ascertain the assessed valuations of the properties on each of the white owned sections that surround section 14?

A. I did.

(Testimony of Benton Beckley.)

Q. Taking the bulk assessment of the property and improvements, and from that, by applying a mathematical percentage, ascertaining that the assessment was approximately one-fifth of the market value, arrived at an average value per acre of each section? [115]

A. I arrived at the value of a piece of ground by the actual sale price at the time. Two years from now the sale price might be lower or might be more.

The Court: Please answer the question. The question is: Did you use the assessed value of the surrounding property in the same manner?

The Witness: That is right.

The Court: That Mr. Gallagher described here this morning?

The Witness: That is right.

Q. (By Mr. Brett): After obtaining a conclusion as to the average acreage value in each of the white owned sections that surrounded the Indian owned sections, you applied that average to the Indian owned sections? A. Yes, sir.

Q. Did you as a part of your conception in fixing this million dollar overall value assume that a portion or all the Indian lands would have utility for business purposes?

A. This particular land here, Mr. Brett, I do not think can be classified as all the surrounding property on the other side of this pink line, you see, where the wind section is. All of the area of his land lays in a section that can't be replaced, and, as wants have gone on in Palm Springs, has in-

(Testimony of Benton Beckley.)

creased in value from 10 to 20 per cent every year from 1936. [116]

Mr. Brett: Just a minute. I move to strike that as not responsive, and it is not in any way responsive as an answer to my question. May I have the question read, please?

The Court: Read it, please, Mr. Reporter.

(Question and answer read by the reporter.)

The Court: The answer may stand. Motion denied.

The Witness: As a preliminary, I would like to tell Mr. Brett he is trying to classify this property with the outlying property in Palm Springs, and the prices vary according to the locations of the property.

The Court: The question was: What did you do—please read it, Mr. Reporter.

(Question again read by the reporter.)

A. Yes, sir.

Q. (By Mr. Brett): That is, you assumed that a portion of the Arenas lands which are shown on the Respondents' Exhibit A as being Lots 46 and 47 in Section 14, and as shown as 6 separate units in Section 26 would have adaptability for use and could be used for business purposes?

A. Yes, sir.

Q. Under C-2?

A. C-2 and trailers, and C-3, manufacturing, M-1—any of those classifications.

The Court: Any further questions?

(Testimony of Benton Beckley.)

Mr. Brett: I would like to ask him the same questions [117] generally, the two questions that I asked Mr. Gallagher.

Q. In taking your overall figure did you assume that the market value of parcels 46 and 47 in Section 14 were at the rate of \$20,000 per acre?

A. Yes, sir.

Q. And in connection with the lands that are in Section 26 did you assume that the 10 and 20-acre parcels which are just immediately east of Lots 39 and 40 had a market value of \$12,000 per acre?

A. Yes, sir; or more.

Q. And that the 10- and 40-acre pieces which are immediately east of those parcels had a value of \$9500 an acre? A. More than 9500.

Q. Do you know from your experience as a realtor in Palm Springs of any unimproved lots that are within the areas that are shown on Respondents' Exhibit A which were sold in units of either 10 or 20 or 30 acres, that is, the single unit of either of those three amounts, and were unimproved, and were sold for \$12,000 an acre?

A. Within three miles of town there is a steak house and it was an acre and a quarter, sold for \$42,000. Across the street from——

Mr. Brett: Pardon me just a minute. It is quite apparent that you have not understood the question. [118]

The Witness: Unimproved; I realized that.

Q. In the first place, that is improved; in the second place, it is much less than 10 acres. Now, my

(Testimony of Benton Beckley.)

question is this—and this is all I want to know: Do you know of any sale in the Palm Springs area that is shown on the Respondents' Exhibit A of either 10 acres as one unit, or 20 acres as one unit, or 30 acres as one unit at a price of \$12,000 per acre?

A. I don't know of any you could buy at that. McManus owns——

The Court: Do you know of any that were sold at that price? That is the question.

Mr. Brett: And which are unimproved?

A. It has all been broken down into subdivisions.

The Court: Then your answer is "no"?

The Witness: "No"; that is right.

The Court: You do not know of any units that large?

The Witness: No, sir.

Mr. Brett: Now, then, one other question.

Q. Do you know of any lands in the area that I have just described that were sold in units of either 10 acres or 40 acres or 50 acres, in that size units, that were unimproved——

A. There is one point here, Mr. Brett——

The Court: Let the question be finished. [119]

The Witness: This property of Lee Arenas' has water on it, which can't be classified as unimproved, is that right?

The Court: Have you finished your question, Mr. Brett?

Mr. Brett: I have not finished my question.

The Court: Read it, please, Mr. Reporter.

Mr. Brett: But I am perfectly willing to add the

(Testimony of Benton Beckley.)

factor that there is water available. By improvements I mean some form of structure or improvement upon the land or the emplacement of streets, etc.

Q. Do you know of any parcels in that area that is shown on Respondents' Exhibit A that were sold in units of either 10 acres or 40 acres or 50 acres, as a unit, at a price of \$9500 per acre?

A. Five acres is the largest parcel that has been available for sale, and it is available today at \$35,000, five acres.

Q. My question was: Do you know of any being sold at those prices?

A. There hasn't been any on the market to be bought, Mr. Brett.

The Court: Then your answer is "no"?

Q. (By Mr. Brett): Then your answer is "no"?

A. "No."

Mr. Brett: That is all.

The Court: Any further questions: You may step down, Mr. Beckley. [120]

(Page 358, line 16, to page 360, line 1):

The Court: What further is there, Mr. Brett?

Mr. Brett: Before the respondents close, your Honor, I have prepared in writing and I now hand counsel two copies, and I hand the clerk an original—and I hope it is the top carbon copy for the court; I certainly tried to obtain it—of the Government's motion to strike the testimony of the witnesses Joseph A. Gallagher, Sr., and Benton Beckley as to the opinions of value expressed by them, not the rest of their testimony.

The motion is detailed and there is annexed to it the points and authorities, and then annexed to it quotations from the points and authorities for counsel. And I should like at this time to file the motion and I should like to have leave for some time to be fixed by your Honor to have the opportunity of arguing the motions. I realize that I can't do it today and I assume that counsel will probably want to make some reply and give citations.

The Court: Is it noticed for hearing?

Mr. Brett: No; I have not. It is not a matter to be noticed for hearing, because it would occur ordinarily in the course of the trial, but I prepared it in this form by reason of our time limitations.

The Court: Very well. Is there any further testimony?

Mr. Brett: No, your Honor.

The Court: Any further evidence to be offered by petitioners or respondents? [121]

Mr. Brett: Respondents have no more, your Honor.

The Court: Do both sides rest?

Mr. Preston: I will tell you, your Honor, I think we rest, but I want about 10 minutes' argument and I would rather not say I am absolutely through until the day of the argument, if the court wants to fix a time for that.

The Court: Very well. Then I will continue the hearing until a day certain, gentlemen, and then at that time I will hear any further testimony and motions to strike, and any further argument. How much time do you think will be necessary? [122]

(Page 402, line 20, to page 412, line 5):

Mr. Brett: If the court please, I don't want to interrupt this statement that Judge Preston is about to make, because we are all interested in that issue. I did want to point out that the case is not closed from the standpoint of submission until we have a ruling upon the motion to strike that the government filed. They filed it some time ago.

The Court: Yes, I am ready to rule upon that at any time. Perhaps we had better rule upon it now.

Is there any further evidence, gentlemen?

Mr. Preston: Not that I know of.

The Court: Then all sides rest, and the evidence is closed again.

Do you wish to argue it, Mr. Brett?

Mr. Brett: I did, your Honor, but I will abide by your desires.

The Court: Do your objections go to the weight of it?

Mr. Brett: No, I don't think so. I think they go directly to the fact that it is improper matter.

Mr. Preston: The expert witnesses?

Mr. Brett: I have made a motion in writing to strike the conclusions, the value as stated by Mr. Gallagher, upon the ground that he has used as a part of his evidence, by his own statement, assessed values.

I might say that probably the best example of that would be the exhibit which was introduced in evidence as [123] Petitioners' Exhibit 14-A, and which is replete with numbered designated portions, list-

ings, or sales, on which it says that the basis of the value is the assessed value.

The Court: Isn't that only one of the bases?

Mr. Brett: I don't think so.

The Court: He was asked his reasons and he was cross examined. He wasn't asked his reasons, I take it, but he was cross examined on the question.

Mr. Brett: He was cross examined on the——

The Court: He said that is one of his defenses of his opinion.

Mr. Brett: I don't think it is in this report for this reason——

The Court: Can we go so far as to say that he testified that the sole basis for his opinion was some formula based upon the assessed value?

Mr. Brett: I think so, because he not only so stated, but he states so elsewhere in his report, which was adopted as part of his opinion.

I call your attention to the fact that in evaluating both of these areas he evaluated them in certain sections, that is, Section 14 and Section 26, as to acreage, and he specifically stated—pardon me just one moment—on page 11 of his report—page 19 of his report, your Honor—and then I cross examined him and he adhered to it, and so did [124] the other witness whose testimony is attacked, that he used the same methods. He says on page 19:

“I have averaged acreage value in Section 11, 23, 13 and 15, which sections are located north, south, east and west respectively, and have arrived at what in my opinion is the fair market acreage value of

land in Section 14, the subject-matter of this appraisal."

Then he gets a value which he admitted was arrived at by taking both improved and unimproved properties, and the assessed value of them as units, and I specifically asked him that question, and he answered yes.

The Court: Well, suppose a witness comes in and he says, "Now, I think in my opinion the property is worth X dollars," and he is taken over on cross examination, "Why do you think so?" "To show you one reason why my opinion is sound, I will take the opinion of the tax assessor, and by a formula which is often applied I will prove to you that it coincides actually or substantially with my opinion." Would that render his opinion incompetent?

Mr. Brett: In my opinion under the law it would. He went further.

The Court: What is the legal objection to basing the opinion upon the tax assessment? It is because it is an opinion based upon an opinion, isn't it?

Mr. Brett: Because it is an opinion based upon something which in itself is incompetent.

In other words, if a thing is incompetent, the fact that you use a formula to multiply it by another figure doesn't make it any less incompetent.

The Court: It is incompetent because it is a mere opinion of the tax assessor, isn't it, who is not called as a witness?

Mr. Brett: That is right.

The Court: And not subjected to cross examination.

Before I would strike a witness' testimony, he would have to say to me that "That is all I base it upon, that is the only thing I have to go on, I take the assessor's opinion and I multiply it by two, three, four, five, something like that," then I would strike it.

Mr. Brett: Your Honor, will you bear with me just one moment, because I know we have had a long time——

The Court: It isn't a question of time. If there was any doubt in my mind I would hear you extensively.

Mr. Brett: It goes a little further in this case. I think that would be incompetent, and I think my motion would be good, but this is a much worse case, because this is what he says in his report in the exhibits and directly on cross examination. He went further than that. He says that the ultimate, only basis which he used to get this acreage value [126] was this. He found there were four sections that surrounded it, he took each section and he got assessed values, and let's say he got other values, because he said he did, some of which were unimproved properties, some of which were improved property, and he obtained a unit value of improved and unimproved property throughout this section, then by taking the acreage in that section he arrived—in other words, the section, of course, has so many acres, 640 acres—by taking that lump gruel, or hash, if it is not an improper word, he divides it

by 640 and he arrives at an acreage value for that section, say, to the right of this section. He uses the same process on all four sections, then he divides by the four sections, and that is the way that he gets a value of an unimproved Indian section which is restricted.

That method is thoroughly incompetent, and that is the only method he used by his own testimony.

I don't say that some of the ingredients that he used, threw into the pot, were not properly arrived at, I couldn't say that.

The Court: Doesn't that all go to the weight?

Mr. Brett: I don't think so.

The Court: Once he is qualified, once he is shown qualified to express an opinion, and he expresses that opinion, that is the evidence, isn't it, and cross examination goes to the weight of it? [127]

You might put the best real estate man in the world on the stand, and he expresses an opinion as to value, and on cross examination he might say, "Well, I will tell you what I do, I go through all these things that real estate men usually go through, then if I have any doubts I take a little astrology to resolve my doubts, I do this, or I depend on some other element of chance between this figure and that figure, that is how close it is with me sometimes, but still that is my opinion," could you strike it?

Mr. Brett: On the last example you made I think those were competent elements. The other is not. I didn't understand anything you used was incompetent. I understood you to say that he got certain data, he got certain information from others, and

then he adjusted it, based it on experience, based it on something else, or whatever method he used.

The Court: Suppose he says to you, "I can't tell you how I arrived at it, I couldn't begin to tell you all the things that go into my determination," wouldn't that go to the weight of his testimony?

Mr. Brett: I think that would go to the weight.

The Court: If you said to him, "Well, do you use assessed value?" "Yes, I consider assessed value."

Mr. Brett: That isn't all. If he said only that, I think probably even though I think that would be fallacious on his part, probably it would be overweighed by the other [128] matter. But he went further on that.

The Court: In order to strike it, must you not be able to say that he predicated his opinion solely upon that?

Mr. Preston: That is San Diego against Neale.

Mr. Brett: Did your Honor read the memorandum that I attached there?

The Court: Yes.

Mr. Brett: The Supreme Court hasn't said so. The Supreme Court says specifically this language: " * * * but we think that when a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions"—

He showed clearly that they were chief elements.

The Court: That goes to the weight of his testimony.

Mr. Brett: The court says it should be stricken.

There is one other thing that is equally important. The assessment is only one. The other point is equally important. That is evidenced by this Long Beach School District case in 30 A.C.

This man by his own testimony and by his report, which was a part of his testimony, shows that he was taking values based upon business properties which are along the principal street of the City of Palm Springs, he was taking values of dude ranches, and so forth, and huge hotels, and applying [129] them as a part of his considerations in fixing value of an area which at the time and at the present, and so far as anyone here can determine is still restricted to what in effect is a 30-day permit.

The Court: But that goes to the weight of it.

Mr. Brett: Your Honor, you can't fix a value——

The Court: You can say he disregarded the zoning ordinances, you can say he disregarded the restrictions, you can say he disregarded a great many other things, but that all goes to the weight, doesn't it?

Mr. Brett: I don't think so. I think, if your Honor please, that if you would give a value for a use which is prohibited by law, or a use which by the nature of the circumstances of the case couldn't be used—for instance, if you are going to put it for mining value and there were no minerals, and it was demonstrated as such, or if the law prohibits such a use, not only now but as far as you can see into the immediate future, then it seems to me that you have an incompetent matter. He is on the horn of two dilemmas in his opinion.

The Court: It all goes to the weight, Mr. Brett. Suppose you had a case where there is a question of whether it was mineral land or not, and the plaintiff claimed it was, and brought in experts and propounded to them hypothetical questions, assume this land contains minerals; the defendant [130] brings in experts and propounds a question that doesn't mention minerals; on cross examination the attorney for the plaintiff says, "Well, Mr. So-and-so, did you consider that this was mineral-bearing land?" "No, no one ever suggested that to me, it looks just like land to me." "Then you didn't consider that in your computation or in arriving at your opinion?" "No."—would you move to strike his testimony?

Mr. Brett: No, because that would be admissible. Here is the distinction. This man himself admits and introduced in evidence, as far as the use by anyone other than Indians, the use law which was then existent, and which would prohibit any of the uses which he had. This whole area if it went into white hands as it stands now, insofar as anyone can tell at the present time, is restricted so it couldn't be used in the manner in which he evaluated it. If you take it from the standpoint of its present governmental restrictions it is even more limited. So there was no dispute as to the facts.

Your example, of course, then raised an issue of fact. Of course, he can value it on any theory where there is an issue of fact. I would say, however, if you would change your example a little bit, if both parties stipulated in advance that the land was non-

mineral-bearing, and then a witness announced that the basis of his opinion, either in whole or in part, was its mineral value, I would say then it could [131] be stricken as incompetent and wouldn't go to the weight, because it wouldn't have such value. This doesn't have such value. This land could not be used for the uses for which this man evaluated it, either under the existing restrictions or under the restrictions of the City of Palm Springs, if it was put into white ownership.

The Court: It seems to me those considerations all go to the weight, Mr. Brett. The motion to strike the testimony of witnesses Joseph A. Gallagher, Sr., and Benton Beckley is denied. [132]

[Endorsed]: Filed Aug. 7, 1951.

[Title of District Court and Cause.]

Los Angeles, California,

Monday, March 29, 1948. 1:45 p.m.

The Clerk: No. 1321-O'C, Lee Arenas v. United States, further hearing on return of order of October 24, 1947 to show cause why attorneys' fees and expenses should not be allowed.

Mr. Brett: Ready for the United States.

Mr. Taheny: Ready for Mr. Arenas.

Mr. Preston: May I be allowed to address the court for just a few minutes on the law points?

The Court: Yes, I would like to hear from the petitioners on this contract question, their view of the relation between the contract of November 20,

1940, between Arenas and Sallee, and the subsequent agreement, the power of attorney and contract executed by Arenas in favor of Sallee, Preston and Clark.

Mr. Preston: I was thinking that might be of some value. I spent the forenoon on that subject, and I have a couple of memoranda that I would like to hand to the court.

The Court: Very well.

Mr. Taheny: Your Honor, can I say this? I have a letter sent by Mr. Sallee which I would like to have added to this record. It was given to me by my clients. At the hearing we held a few weeks ago, Mrs. Arenas remembered the letter and she has found this. I believe she will be here in a little [401] while.

The Court: Have you shown it to the petitioners?

Mr. Taheny: I showed them copies of it.

My clients have just come into court now, your Honor.

The Court: The motion is to reopen the evidence on behalf of Lee Arenas and introduce a letter.

Mr. Taheny: That is right.

The Court: Is there any objection to it?

Mr. Preston: I haven't any.

The Court: The evidence is reopened for that purpose. It will be stipulated that the letter in question was written by Mr. Sallee on or about the date it bears and sent in the regular course of mail to the person to whom it is addressed?

Mr. Clark: Yes, your Honor.

Mr. Taheny: Yes, your Honor, and received by them.

Mr. Clark: And received in the course of mail.

The Court: Very well. The document is received in evidence and it will be marked——

The Clerk: Respondent's N.

[Printer's Note: Exhibit N is set out at page 359 of this printed record.]

Mr. Brett: If the court please, I don't want to interrupt this statement that Judge Preston is about to make, because we are all interested in that issue. I did want to point out that the case is not closed from the standpoint of submission until we have a ruling upon the motion to strike that the government filed. They filed it some time ago. [402]

The Court: Yes, I am ready to rule upon that at any time. Perhaps we had better rule upon it now.

Is there any further evidence, gentlemen?

Mr. Preston: Not that I know of.

The Court: Then all sides rest, and the evidence is closed again.

Do you wish to argue it, Mr. Brett?

Mr. Brett: I did, your Honor, but I will abide by your desires.

The Court: Do your objections go to the weight of it?

Mr. Brett: No, I don't think so. I think they go directly to the fact that it is improper matter.

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Gallagher, upon the ground that he has used as a part of his evidence, by his own statement, assessed values.

I might say that probably the best example of that would be the exhibit which was introduced in evidence as Petitioner's Exhibit 14-A, and which is replete with numbered designated portions, listings, or sales, on which it says that the basis of the value is the assessed value.

The Court: Isn't that only one of the bases?

Mr. Brett: I don't think so.

The Court: He was asked his reasons and he was cross-examined. [403] He wasn't asked his reasons, I take it, but he was cross-examined on the question.

Mr. Brett: He was cross-examined on the——

The Court: He said that is one of his defenses of his opinion.

Mr. Brett: I don't think it is in this report for this reason——

The Court: Can we go so far as to say that he testified that the sole basis for his opinion was some formula based upon the assessed value?

Mr. Brett: I think so, because he not only so stated, but he states so elsewhere in his report, which was adopted as part of his opinion.

I call your attention to the fact that in evaluating both of these areas he evaluated them in certain sections, that is, Section 14 and Section 26, as to acreage, and he specifically stated—pardon me just one moment—on page 11 of his report—page 19 of his report, your Honor—and then I cross-examined him and he adhered to it, and so did the other witness

whose testimony is attacked, that he used the same methods. He says on page 19:

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Then he gets a value which he admitted was arrived at by taking both improved and unimproved properties, and the assessed value of them as units, and I specifically asked him that question, and he answered yes.

The Court: Well, suppose a witness comes in and he says, “Now, I think in my opinion the property is worth X dollars,” and he is taken over on cross examination, “Why do you think so?” “To show you one reason why my opinion is sound, I will take the opinion of the tax assessor, and by a formula which is often applied I will prove to you that it coincides actually or substantially with my opinion.” Would that render his opinion incompetent?

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The Court: What is the legal objection to basing the opinion upon the tax assessment? It is because it is an opinion based upon an opinion, isn't it?

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In other words, if a thing is incompetent, the fact that you use a formula to multiply it by another figure doesn't make it any less incompetent.

The Court: It is incompetent because it is a mere [405] opinion of the tax assessor, isn't it, who is not called as a witness?

Mr. Brett: That is right.

The Court: And not subjected to cross examination.

Before I would strike a witness' testimony, he would have to say to me that "That is all I base it upon, that is the only thing I have to go on, I take the assessor's opinion and I multiply it by two, three, four, five, something like that," then I would strike it.

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The Court: It isn't a question of time. If there was any doubt in my mind I would hear you extensively.

Mr. Brett: It goes a little further in this case. I think that would be incompetent, and I think my motion would be good, but this is a much worse case, because this is what he says in his report in the exhibits and directly on cross examination. He went further than that. He says that the ultimate, only basis which he used to get this acreage value was this. He found there were four sections that surrounded it, he took each section and he got assessed values, and let's say he got other values, because he said he did, some of which were unimproved properties, some of which were improved property, and he obtained a unit value of improved and unimproved property throughout this section, then by

taking [406] the acreage in that section he arrived—in other words, the section, of course, has so many acres, 640 acres—by taking that lump gruel, or hash, if it is not an improper word, he divides it by 640 and he arrives at an acreage value for that section, say, to the right of this section. He uses the same process on all four sections, then he divides by the four sections, and that is the way that he gets a value of an unimproved Indian section which is restricted.

That method is thoroughly incompetent, and that is the only method he used by his own testimony.

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The Court: Doesn't that all go to the weight?

Mr. Brett: I don't think so.

The Court: Once he is qualified, once he is shown qualified to express an opinion, and he expresses that opinion, that is the evidence, isn't it, and cross examination goes to the weight of it?

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Mr. Brett: On the last example you made I think

those were competent elements. The other is not. I didn't understand anything you used was incompetent. I understood you to say that he got certain data, he got certain information from others, and then he adjusted it, based it on experience, based it on something else, or whatever method he used.

The Court: Suppose he says to you, "I can't tell you how I arrived at it, I couldn't begin to tell you all the things that go into my determination," wouldn't that go to the weight of his testimony?

Mr. Brett: I think that would go to the weight.

The Court: If you said to him, "Well, do you use assessed value?" "Yes, I consider assessed value."

Mr. Brett: That isn't all. If he said only that, I think probably even though I think that would be fallacious on his part, probably it would be outweighed by the other matter. But he went further than that.

The Court: In order to strike it, must you not be able to say that he predicated his opinion solely upon that?

Mr. Preston: That is San Diego against Neale.

Mr. Brett: Did your Honor read the memorandum that I attached there? [408]

The Court: Yes.

Mr. Brett: The Supreme Court hasn't said so. The Supreme Court says specifically this language: "* * * but we think that when a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief

elements in the calculations which lead him to such conclusions”——

He showed clearly that they were chief elements.

The Court: That goes to the weight of his testimony.

Mr. Brett: The court says it should be stricken.

There is one other thing that is equally important. The assessment is only one. The other point is equally important. That is evidenced by this Long Beach School District case in 30 A.C.

This man by his own testimony and by his report, which was a part of his testimony, shows that he was taking values based upon business properties which are along the principal street of the City of Palm Springs, he was taking values of dude ranches, and so forth, and huge hotels, and applying them as a part of his considerations in fixing value of an area which at the time and at the present, and so far as anyone here can determine is still restricted to what in effect is a 30-day permit.

The Court: But that goes to the weight of it.

Mr. Brett: Your Honor, you can't fix a value
—— [409]

The Court: You can say he disregarded the zoning ordinances, you can say he disregarded the restrictions, you can say he disregarded a great many other things, but that all goes to the weight, doesn't it?

Mr. Brett: I don't think so. I think, if your Honor please, that if you would give a value for a use which is prohibited by law, or a use which by the nature of the circumstances of the case couldn't

be used—for instance, if you are going to put it for mining value and there were no minerals, and it was demonstrated as such, or if the law prohibits such a use, not only now but as far as you can see into the immediate future, then it seems to me that you have an incompetent matter. He is on the horn of two dilemmas in his opinion.

The Court: It all goes to the weight, Mr. Brett. Suppose you had a case where there is a question of whether it was mineral land or not, and the plaintiff claimed it was, and brought in experts and propounded to them hypothetical questions, assume this land contains minerals; the defendant brings in experts and propounds a question that doesn't mention minerals; on cross examination the attorney for the plaintiff says, "Well, Mr. So-and-so, did you consider that this was mineral-bearing land?" "No, no one ever suggested that to me, it looks just like land to me." "Then you didn't consider that in your computation or [410] in arriving at your opinion?" "No."—would you move to strike his testimony?

Mr. Brett: No, because that would be admissible. Here is the distinction. This man himself admits and introduced in evidence, as far as the use by anyone other than Indians, the use law which was then existent, and which would prohibit any of the uses which he had. This whole area if it went into white hands as it stands now, insofar as anyone can tell at the present time, is restricted so it couldn't be used in the manner in which he evaluated it. If you take it from the standpoint of its present govern-

mental restrictions it is even more limited. So there was no dispute as to the facts.

Your example, of course, then raised an issue of fact. Of course, he can value it on any theory where there is an issue of fact. I would say, however, if you would change your example a little bit, if both parties stipulated in advance that the land was non-mineral-bearing, and then a witness announced that the basis of his opinion, either in whole or in part, was its mineral value, I would say then it could be stricken as incompetent and wouldn't go to the weight, because it wouldn't have such value. This doesn't have such value. This land could not be used for the uses for which this man evaluated it, either under the existing restrictions or under the restrictions of the City [411] of Palm Springs, if it was put into white ownership.

The Court: It seems to me those considerations all go to the weight, Mr. Brett. The motion to strike the testimony of witnesses Joseph A. Gallagher, Sr., and Benton Beckley is denied.

Mr. Preston: May it please the court, in what I have to say here today—

Mr. Brett: Pardon me just a moment. There is also a question, your Honor, whether we have to reserve exceptions, because the new rules don't apply? This is not condemnation, though, and exceptions are automatic.

The Court: You may reserve an exception to all adverse rulings.

Mr. Preston: As I was about to say, in what I am going to present to the court, I am not going to

dwell at length upon the value or the testimony concerning the value of my own services or that of the services of my associates.

The Court: Perhaps it might be helpful for me to mention to you a matter that is in my mind. The contract of November 20, 1940 provides for a 10 per cent fee to Mr. Sallee, and provides generally for representation of all of Lee Arenas' interests in connection with tribal lands, and it provides that Sallee is authorized to associate with him in said work such assistants, including attorneys, as he may select. [412]

And then over on page 5 it provides 10 per cent compensation based upon reasonable market value.

On page 6 it provides the method for payment in kind in the event the parties do not agree as to the manner in which the compensation is to be paid.

The later contract of February 1, 1945 provides a quantum meruit basis of compensation, but does not mention the earlier contract. Does the 1945 contract supersede the 1940 contract, and if so, to what extent? And if only to the extent of compensation, fixing the measure of compensation, what of the point Mr. Taheny raises in the closing portion of his brief that there is a method provided by the 1940 contract for payment in kind, and that provision is still in force and will control here, even though the later contract might be the measure of compensation?

Mr. Preston: Well, that latter point, your Honor, is the one that would have to receive some further consideration, probably, in my brief, but I had

anticipated everything you have said up to that last point, and I want to make myself clear about it.

The first point they make is that this contract, being one entered into—that is, the '45 contract—being one entered into while the relationship of attorney and client existed is presumed, they say, to be fraudulent. That is not the law. [413]

The Court: You don't need to spend any time on that.

Mr. Preston: The next point I will direct your attention to is the one you have just discussed, and that is that when I came into the case September 3, 1943 the case had been through the District Court and the Circuit Court of Appeals with unfavorable decisions in both courts. The St. Marie case with three strikes against it was also before us at the time. The testimony of Mr. Clark and Mr. Sallee both is that in September, 1943 and before I came into the case they had an oral understanding with Mr. Arenas that the contract should be revamped for the purpose of providing compensation for me. Now, my point of law there is, your Honor, that even though that was an oral contract, when I performed the service and concluded it, as has been done in this case, that even an oral arrangement of that sort was a rescission by consent of the 1940 contract. That is true, because the section of the Code provides that a contract is rescinded by mutual consent or by an executed oral agreement, or by a writing.

In this case from the fall of September, 1943 until the 1st of February, 1945 this matter rested in

parol, orally, but the services were being performed constantly throughout that period. The services continued after 1945 and have continued up until this litigation is concluded. That makes a rescission of the old contract and makes the contract one [414] of quantum meruit as a matter of law.

That is true because of the reading matter of Section 1611 in connection with the cases cited in the memorandum. On the oral feature of it, Section 1611 says when a contract does not determine the amount of consideration, nor the method by which it may be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.

The Court: That is Section 1611?

Mr. Preston: 1611.

The Court: Of what code?

Mr. Preston: Civil Code.

So if we had no '45 contract here whatsoever, under the testimony of Mr. Clark and Mr. Sallee, and under the services performed by me from that day forward, you would have a complete case for quantum meruit even though there wasn't a dollar spoken of as to how it should be paid.

The Court: Where does that leave the 1940 contract? What becomes of it?

Mr. Preston: That rescinds the 1940 contract absolutely by consent under 1689, Subdivision (5).

The Court: If that was the intention of the parties why wasn't something said in this 1945 contract about the 1940 contract? [415]

Mr. Preston: I don't know why it should be. I am not testifying in the case on that point, but the testimony here is that it was understood that everything was to be what the court thought it would be worth, that the whole matter should be left in the hands of the court as to quantum meruit, and I couldn't see how there could be any advantage taken of the Indian.

I might say off the record that I am the fellow that suggested that method of doing it so there would be nobody hurt in the matter whatever.

The Court: Is there any explanation here as to why the 1945 contract didn't contain a sentence to the effect that the 1940 contract is hereby superseded or terminated?

Mr. Preston: I don't think there is any express testimony in the record. If I remember right, I don't remember any.

Mr. Clark gave the testimony, he can probably refer to it more readily than I can, but I don't know of any specific statement to that effect.

When the 1945 contract came about, what had happened in 1943 in the fall, just after my employment, about the same time, I think, the ejectment actions were begun. I appeared in those ejectment actions, not only for Arenas, but for others, and filed 14 or 15 answers here in that case, and moreover when the case of Lee Arenas was tried, already there [416] was an understanding with the government that those cases would be dismissed. The Hatchitt cases were to take precedence over all the cases in the St. Marie column, and the trial of the

Arenas case was to take care of his own ejectment suit, and the understanding was that at the time of the trial those suits would be dismissed, and they were accordingly a short time thereafter dismissed. So between September 3, 1943 and February 1, 1945 I had done all the work in these two cases, in connection all the time, of course, with my associates, but I was doing the work all the time and I was leading in the work because I was selected for that purpose.

So the issue in the ejectment suit is the same issue, involved the same thing as the issue that we tried. In other words, the validity of the allotment was involved, and if it was valid it was a defense to the ejectment suit, the same as a right of recovery in the other suit.

So when they come on the stand and say that they signed this 1945 contract for the purpose of taking care of the services performed in the ejectment suit, that is an admission itself that there would be a necessity for a rescission completely of the 1940 contract, because they are the same thing, involved the same issue exactly. That itself to be an abrogation of the 1940 contract.

Now, then, added to that is the fact that in 1945 on [417] February 1st this contract was recast or revised or displaced, whatever you want to call it, the contract covering the entire subject-matter was executed on February 1st, 1945, and it is my view of the law, after looking into it carefully and refreshing my memory on some experiences that I had before on this subject, I am sure that even as to

Clark and Sallee that contract is rescinded, as well as the portion to myself who was never a party to it.

Take the case of Treadwell vs. Nichol in which I participated as an expert witness, Mr. Treadwell was hired by the year by Miller-Lux Corporation, with the understanding that he should, so it was claimed, take care of the individual matters of all stockholders, and he handled a nine million dollar estate matter, tax matter, rather, for the estate of Henry Miller, and he brought suit for \$300,000 for his attorney's fees, and they contended that his services were covered by his previous contract, and he went into and proved an oral arrangement with them, and that was held to be good or justified the finding of the jury in that case, and I quote from that in the brief that I have filed with your Honor.

I remember also the case of Julian vs. Gold, which caused so much talk throughout the bar of this state, which was on the identical same subject that an executed oral agreement is a release completely of an existing contract. [418] Of course, when one is executed in writing it is much more so.

That is our view on the law as I understand it.

This last point suggested by your Honor, I think you will have to hold when you see this record in full that the terms of the '45 contract are broad enough to abrogate all the terms of the 1940 contract. I don't see how it could be otherwise.

The next point to which I desire to offer a few remarks, your Honor, is in answer to the brief of counsel for the United States in this case.

Counsel for the United States have filed a lengthy

brief setting forth various propositions of law, all of which are sound, no doubt, in their right orbit or ambit, but unsound, in my opinion, in the present controversy.

The case of Equitable Trust Company was written in the light of all the points he makes, and the Anglin & Stevenson case was written, also, in the light of all the points that he makes.

Counsel seems unable to understand the position of the government of the United States in this case. The government of the United States through the Congress of the United States not only vouchsafed and guaranteed to this Indian a cause of action for the establishment of his right to an allotment, but the United States is the entity that he has had [419] to fight throughout the entire proceeding. This case, therefore, is one where Congress has given the right of action, and the government of the United States has tried to prevent the Indian from getting his rights under that statute which Congress passed.

All we are contending for here is that Lee Arenas, a Mission Indian of California, shall have the same rights as John Doe or any other white citizen in the community.

This rule of equity with reference to the payment of attorney's fees is for the protection of the litigant, as much, if not more than, for the protection of the Indian getting just compensation.

If the Indian cannot go out into the bar and procure a lawyer upon the same terms and conditions that a white man could do it, he is not getting

under the statute of the United States the rights that are given him on the face of the statute itself. In other words, you must not subtract from the rights of this Indian and yet at the same time say that he has been given justice under this statute.

So when Lee Arenas went out to the bar to get attorneys he had the right to guarantee to them and to trade with them upon the same basis that a white man could have done under the same circumstances.

This situation is a little bit different, too, in other respects. Counsel keeps saying that the United States owns [420] this land. Well, the United States does not own this land. The United States has at most the right of restriction against alienation.

I have cited in the brief to your Honor decisions which give the Indian tantamount to a fee simple.

The Court: How can the government comply with the statute to turn the land over to him at the end of the trust period free and clear of all encumbrances if there is a power to impress a lien upon the land in the hands of the government?

Mr. Preston: I didn't understand the query, your Honor.

The Court: The statute says that the government shall turn the land over to the Indian free and clear. Is that correct?

Mr. Preston: When it does turn it over it will be free and clear, yes.

The Court: Of all encumbrances?

Mr. Preston: That's right.

The Court: If this court were to impress a lien at the present time upon the land in the hands of

the government, the government couldn't turn it over free and clear, could it?

Mr. Preston: I think you will have to read the decision in the Equitable Trust Company case, your Honor——

The Court: In the Equitable Trust Company case they were [421] dealing with a fund, a fund that had been turned over already, and the fund was on its way back into the hands of the Indian, and the fees were deducted from the fund.

Mr. Preston: He made the same assumption, however,——

The Court: There is a statement to the effect that they assumed that the fund was subject to the same conditions as the land, but they didn't directly consider the effect of that statute.

Mr. Preston: The point is, your Honor, under the provisions of this statute the proper interpretation of it is that in a case such as the one before the court the government has waived and cannot insist upon the restriction as to the lien of the attorney for his compensation.

The Court: Can the government waive when Congress has said what they shall do?

Mr. Preston: Congress has already said, that is what I mean—when Congress said that the Indian shall have the right to sue and have established his claim to an allotment, if the Indian has to give us a part of that allotment to get it the government says go ahead. A court of equity has the power.

The Court: Can the court do anything more in view of that statute than this? That is, to impress

a lien upon Arenas' interest in that land, whatever it may be, and a lien upon any proceeds which may be paid to Arenas, but the lien [422] attach only in the hands of Arenas and not in the hands of the government?

Mr. Preston: What I am going to say now, your Honor, in answer to that, may or may not be in my own interests, but I want to make just an observation upon that point. If you give us, as you have signified tentatively that you may, a lien upon the equitable right of the Indian, Lee Arenas, in this land, it will take twice as much land to satisfy our lien as it would if there were was no restriction on it, maybe four times as much. And when the government stands by and permits you to impress a lien upon the equitable right of that land, and contending for its own legal right for these restrictions, it is doing the worst injury it could do to its own ward.

The Court: If a lien is impressed there will be no means of foreclosing it?

Mr. Preston: You might just as well give us nothing. If we can't foreclose a lien, it isn't worth a two-bit piece. They can extend the restrictions as many times as they want to, the President of the United States has the power, and you can't give a lien and withhold the right to enforce it. I will say that, too.

The Court: If the lien is impressed upon the rents of the land, as they are received by Arenas, wouldn't that protect the petitioner? [423]

Mr. Preston: That would not. That would just

be the same as nothing. I would consider that I had worked for nothing under such a state of facts, because you can't give a man a lien and withhold his right to enforce it. You must give the right of enforcement. That is what the lien is for.

The Court: If the petitioners here were entitled to a lien, a certain percentage, whatever the government wanted to turn over to Arenas, they would have to turn over a certain portion of it to the petitioners, would not that protect them? If not, what more could the court do?

Mr. Preston: I am just telling you, the restriction against alienation has waived and is subservient to a court of equity in a case of this character.

The Court: Let's go at it this way: Suppose the court should seek to impress a lien in the hands of the United States and should seek to implement that lien by appointing a receiver to sell, do you suppose that there is any purchaser who would take that title?

Mr. Preston: I think so. If you hold that we have a first lien on that land, why, we will enforce it, and the government will have to come in and either release it or let it go to sale. That is all it would have to do, and that is what it could do if you give a lien against the equitable estate. But if you give a lien against the proceeds, why, we have nothing, absolutely nothing. [424]

The Court: The lien has to be equitable in its nature, does it not?

Mr. Preston: How is that?

The Court: Any lien that would be impressed

would have to be equitable in its nature, and the government holds the title, how could title be passed?

Mr. Preston: I am telling you that Lee Arenas owns that land for the purposes of paying us, and he owns it free of any claim of the United States.

The Court: Let's just analyze that a moment.

Mr. Preston: All right.

The Court: Lee Arenas couldn't sell anything on that land today, could he?

Mr. Preston: No; but you can put a lien on it that is prior and over the claim of the government against selling it.

The Court: Assume it is worth a million dollars, he couldn't borrow \$100,000 on it, I don't suppose, could he?

Mr. Preston: I don't know whether he could or not.

The Court: Could he borrow \$10,000 on it, do you think?

Mr. Preston: I don't know whether he could or not.

The Court: Could he get a mortgage?

Mr. Preston: That is why I stand before you and say that if you will make an order of the court that he can give a mortgage, he will do it. If you will permit him to make [425] a mortgage, he will make it.

The Court: If he can't do it, then to put the petitioner here in his shoes wouldn't help any, would it?

Mr. Preston: You can give consent for him to make a mortgage without any trouble at all.

The Court: Where is the authority for it?

Mr. Preston: And you can give a lien on it that will be prior to any claim or restrictions by the government. I do not understand this situation anyway. Here is an entity that for 30 years has refused to give the Indians their rights——

The Court: There is no question about it.

Mr. Preston: Then why listen to them here now? They haven't any right to object to this method of disposal at all.

The Court: We are here to apply the law, if we can discover what it is.

Mr. Preston: That is what I am telling you, the Equitable Trust case is the authority for the law that you cannot deceive a cestui que trust out of his rights by the imprudent or wrongful acts of the government of the United States.

The Court: If the government had given Arenas the land, or someone else the land, as in the Equitable Trust case, and the land was on its way back into the hands of the government, then it would be no trouble at all to impress a lien [426] and take a part of it.

Mr. Preston: I have read that thing until I am black in the face, and that is the tersest, most concise and the most far-reaching statement of a decision I ever read in my life, and it says in so many words, and properly interpreted, that it is within the power of a court of equity and it is its duty to protect a cestui que trust against the wrongful acts of a government.

The Court: How far should we go?

Mr. Preston: Here we have the wrongful acts of the government admitted, here we have worked for seven years,—if we are cast off on what we can get out of the proceeds, I can't get the \$256 that I put up as costs in this case.

The Court: I suppose the government is giving Arena several hundred dollars a month now, aren't they?

Mr. Preston: I never heard of it.

The Court: Do you mean he isn't getting any money out of this land?

Mr. Preston: He gets it out of the land, not out of the government.

The Court: Who permits him to get it out of the land?

Mr. Preston: They have got a right to it.

The Court: Who has a right to it?

Mr. Preston: Arenas. He has a right to the use of the land. [427]

The Court: You mean he has a right to operate this land?

Mr. Preston: I think so. I don't know why not. That is my understanding. If he gave a long-term lease he might have to give a permit of some kind, I don't know about that, but for all intents and purposes Lee Arenas owns the equitable title to this land and the legal title, except the bare legal title that remains against alienation.

That is all I can say. I have done my best, and so have all the rest of us, we have worked like the dickens, and there is no appreciation as far as I can see, so far, either from the government or the

Indians, and if you can't give us a lien on something or other, then we are in a hopeless mess.

In the eventide of my career at the bar I hope to get a little something out of this case.

The Court: You do not want to wait until the trust patent expires?

Mr. Preston: They have already extended it. He will tell you that they have extended it until 1964, or some other time. Sure they have extended it. We get nothing.

Mr. Clark: May I supplement the remarks just a few moments, your Honor?

The Court: Yes.

Mr. Clark: Replying to your Honor's inquiry as to why, viewed from the record now before the court, the later contract [428] of 1945 made no reference to the earlier contract of 1940, and not supplementing by any means that which is now in the record, I make these suggestions to the court: that within the rules of law set forth in the last memorandum we have filed it was entirely competent for these parties to agree even orally upon an abandonment and immediate termination of the earlier contract at any time while the contract remained executory. The law in California is well settled and affirmed as recently as within the last three years that this right of termination by mutual consent does not require any consideration to support it. It requires only the mutuality of consent; that it may be exercised at any time while the earlier contract remains executory, but may not remain after

the earlier contract has been fully performed upon either side.

Now, having in mind that rule of law it does, of course, occur that there are several ways in which such mutual abandonment and termination may be evidenced. It may lie, as the cases say, only in the conduct of the parties in that that which they do after the date as of which it is claimed by one or both parties that the contract was terminated the conduct is consistent with the fact that on that day or thereabouts they did agree upon a termination or abandonment of the earlier contract in writing.

The Court: My question, Mr. Clark, was directed to the [429] evidence as to whether there was some explanation that I had not seen from surrounding circumstances that would explain why there wasn't some simple statement in the 1945 contract to the effect that it supersedes the 1940 arrangement.

Mr. Clark: The evidence shows the matter was discussed preliminary to the coming in of Judge Preston, and at the time when he came in, and that evidence is before the court. This writing, which was not at all required under the law, executed in 1945, does refer to the fact that there had been a previous employment of these counsel in the very matters involved in the case at bar. In other words, it says in the third line, “* * * have constituted, appointed and made, and by these presents do make, constitute and appoint * * *.”

“Have made,” of course, refers to that which the record shows without any dispute was the situation

that existed at the time when Judge Preston accepted the appointment.

I say to your Honor, only from the face of the contract and the evidence before the court as to the conversations between the parties, that it did not seem that it was necessary or even desirable to make reference to that which was thereafter to be dead, because none of its provisions in any respect had anything to do with this engagement. I say that against our own interest, perhaps, it might appear, because in that earlier contract, as your Honor very aptly observed at the commencement of the hearing today, there is a provision for the division of the land in kind in the event an agreement otherwise is not arrived at.

There is no such provision in this writing. We do not claim in any slightest respect any right in this matter now before this court to a division in kind by virtue of that earlier provision of the first contract, because it is our opinion that the evidence shows that the first contract was completely wiped out, it was completely abandoned, it was superseded in its entirety by the agreement which is evidenced by the second writing. And if as we believe we are entitled at the hands of this court to a division of this land in kind, and which we do deem in view of the vast discrepancy and the opinions of the experts as to the value of the land is the most equitable manner of providing for the payment of our fees, we rest entirely upon the law applicable to the situation here and not at all on any provision in the earlier writing.

As I say to your Honor, I drew this writing, and I feel now that were I to do it again I would not feel that it was necessary or even desirable to encumber a writing which is full and complete within itself, in evidence of the obligations of the respective parties, to encumber it by a reference to something inconsistent therewith, that theretofore [431] had been reduced to writing and executed by the parties.

Next, may I say just these few words, your Honor, supplemental to that which Judge Preston has said in respect of the power of the court here? That which we must not lose sight of in the determination of the jurisdiction and power of this court in the matter before the court is this fundamental fact: the Secretary of the Interior today could by his order, without consultation of Congress or any superior, free this land entirely from any restraint. That is the power of the Secretary. Since the Secretary has the power of absolute release in his own uncontrolled discretion of the entire corpus of the estate, whatever it may be, of these Indians in these lands, it necessarily follows under the principle that the greater includes the lesser, that the Secretary has the right today in his uncontrolled discretion to release that portion of the land which would constitute, when delivered to the attorneys in this matter, a reasonable compensation for the services they have rendered.

Equity always operates upon the conscience of a party. The reason that we are here is one of a failure of the Secretary of the Interior to perform his sworn duty. The Congress told him in 1918 that

the Congress had exercised on its own behalf the right to determine whether or not these Indians had attained that degree of civilization in [432] which they could thereafter properly own and hold and manage property in their own right. Prior to the enactment of that legislation the Congress had delegated the right to make that determination to the Secretary of the Interior, but since the Interior had never seen fit to make any allotments to the Indians of the education and intelligent capacity of the band of Indians involved here, the Congress in that year 1917 made the determination and directed by its mandate the Secretary to proceed forthwith with the making of these allotments. The Secretary did not perform his duty. It therefore became necessary for the beneficiary of the trust, for the ward of the guardian, to employ counsel, as he did in this case, to compel the Secretary to do his duty. Therefore, what the court did in its decision in this case was simply to operate upon the conscience and the capacities and the powers of the Secretary of the Interior to compel him to do the thing which the Congress said he should do.

The Court: It is your view, then, I take it, that if the court has the power inferred by Congress in an action such as this——

Mr. Clark: That is my point.

The Court: —to step into the shoes of the Secretary of the Interior and do his duty with respect to making an allotment, it has also the power to do justice under the circumstances where the Secretary refuses so to do? [433]

Mr. Clark: That is exactly our point. And if the court possesses, as the Supreme Court has held, the power to compel the Secretary to make the allotments, certainly the court has the power to compel the Secretary in the exercise of a discretionary power to issue such an order, or it will be made by the court in the place of and for the Secretary to make such an order for the division of these lands in kind as can reasonably compensate the lawyers who were employed in the proceedings to compel the Secretary to do his duty.

Equity, your Honor, when once it has taken hold of a subject-matter administers complete relief. And it has been said to the very honor of our profession that equity knows no bounds. The exercise of the powers of equity are as broad as the emergencies and the exigencies of any case, however strange, novel, and without precedent they may be, as, if and when they come before the court. And I say to your Honor that it would be a manifest injustice not only to these counsel—we occupy a very minor position in these proceedings, as I want to let this record show in just a moment in my closing remark—but it would be doing a very manifest injustice to these Indians if this court should hold that having the power to compel the Secretary to do his duty it lacked the power to compel the Secretary to make an order, or in the absence of the Secretary making it, even [434] under the order of compulsion the making of the order as a record of this court in the place of and for the Secretary, to divide these lands in kind, in order that these attorneys may be prop-

erly compensated, I say is absolutely contrary to every rule of reason that threads itself through all of the jurisprudence in America.

The Court: Do you think the court should rather encourage members of the bar to take up the cause of the Indians?

Mr. Clark: That's right, your Honor. I am not unmindful of the fact that the District Judge, occupying the same position in our jurisprudence as does your Honor, in Seattle quite recently took severely to task the members of the bar of that court when he said that he recognized that during the emergencies of the war there had to be very great inroads upon the constitutional rights of our citizens, but he reproved the bar of that court because he said that the lawyers had been unwilling, in his opinion, to advocate as against the government the encroachment upon the constitutional rights of the citizens not justified by the emergency of the war, and he thought that the bar was subject to the very severe and drastic rebuke that he administered to them. And I say this to your Honor, that I think that it is not only one of the highest privileges, I think it is one of the most sacred duties of any lawyer, when confronted with a [435] situation where a ward of the United States, a ward not of choice, but a ward of necessity and of compulsion, as the Indians are, of the United States, finds that he is being held in slavery, that he is being allowed only a very meager part of the substance which under the treaties gave this land to this reservation that is his. And why? Simply because the oligarchy

of the Secretary of the Interior in its Indian Department desires to perpetuate its authority.

I say in those circumstances we deem it to be—though we never got a dollar for it—one of the most drastic commands upon our time and upon our thought and upon our service, even though we appear against our government to our prejudice in other matters where our government is concerned with our clients, to see that the rights of those wards are redressed. And if I had it to do again, your Honor, I would do it.

May I say this, and it answers, I think, the very suggestion your Honor made? In other words, if the court has the power in equity to compel the Secretary to make an order giving a fair division to the lawyer, in payment of reasonable compensation, will it encourage lawyers to embark upon litigation for others against the government?

There can be no harm or fear in that, if such be the logical result, because always it lays in the hands of the court to determine, first, the nature and the character and [436] the value of the services that the lawyer rendered; secondly, what the fair compensation would be as between all of the parties involved; and, third, what is the equitable way of meeting and paying that compensation. And I say that there can never be any danger to the Republic, there can never be any danger to any principle of our jurisprudence reposing in the proposition that lawyers will be encouraged to embark upon litigation if in the end the court is going to say what is fair and right and reasonable, because when the

court has so spoken he has justified the embarkation of that lawyer upon that mission.

And may I say this, your Honor. This is the thing that lies behind this present movement, that transcends in its importance any interest of any of these three lawyers involved, or any of the parties involved in this litigation: if this court is to say that this court lacks the power either to fix the amount or to provide reasonably for the manner and the time of its payment, the compensation of lawyers who are employed by the wards of the government to compel the government to do its bounden duty, then the Indian agency is going to be permitted to continue from now on until the Indians, the vanishing race, have perished from the earth, and when they perish they are going to perish with the shackles of that slavery which even the Supreme Court condemned in this very case still upon their limbs. [437]

I shall never forget in that, my first and only appearance before that court, when I in the commencement of my argument upon the doctrine of estoppel—Judge Preston argued the question of statutory interpretation, but when I began the argument upon the doctrine of estoppel, predicated upon the fact that it was the duty of the Secretary of the Interior to make these allotments, that after these certificates had been issued the Secretary, as the record showed, had said to Mr. Wadsworth, the allotting agent, “You may say to these Indians that they may immediately enter into possession of these allotted properties, they may spend of their own private funds for the improvement of those prop-

erties and enjoyment, because the patents will be issued in due course of time," and they did it, and in this very case thousands of dollars of the personal moneys of Lee Arenas, that had been earned by his own industry and saved by his own carefulness and thrift, was expended in the improvement of this property, which if the allotment could not have been made would have become the property of the tribe, and when I began to make that argument the Chief Justice leaned forward and he said, "Mr. Clark, you need not spend any time in telling us the reason why and the forces behind the refusal of the Secretary to perform what you urge to be his duty in this case." And almost at the beginning my argument upon the doctrine of estoppel was at an end, because the court recognized the soundness of the doctrine.

And when in rebuttal I had concluded the argument, I had that most unusual, as I was told by the clerk, experience when Justice Frankfurter, the only member of the Jewish race on that bench, and with the room packed with government agents, leaned forward and in a voice audible throughout the court room said, "Mr. Clark, I want you to know I am with you 100 per cent."

Now, I say to your Honor that in a situation of that sort, not alone as represented in the opinion of the Supreme Court and represented in the dissenting opinion of Judge Garecht in the St. Marie case, and in his majority opinion in this case, but represented in the heart and the mind and the soul of anyone who knows anything about the facts, so great

an injustice cried out for remedy at the hands of lawyers who knew that unless this court had the power, which we invoke in the fixing and the payment of our compensation, we would undoubtedly go unrewarded, unless it would be at some future time to our children, and perhaps even to their children, because as Judge Preston says unless this court has the power to do that thing which we are asking this court to do, then it means by succession of continuance Judge Preston and I and Dave Sallee would be moldering like Old John Brown in the grave before ever a dollar could come from us, because the income from this property is not more than is required to take care of these Indians, and I say to your Honor that while we came into the case to oppose aggression, we are not coming in now with that service finished and being aggressors in our own right, and we don't want to take one dime from any one of those Indians which is needed for the proper education and the proper support and the proper care of those Indians. Not at all. We would rather go unrewarded, but we say that under the rule of reason that is written into every statute of Congress, and it is written into the statute which told the Secretary what to do in respect of the allotments to these Indians, inheres the equitable power of this court not only to say, as the Supreme Court has said to the Secretary, "You make those allotments," but also to say to the Secretary, "Since you have the power to release the land, now at your own uncontrolled discretion, and since your misconduct has been the reason why these lawyers have

been required to labor for nearly eight years in getting at the hands of the law the power to get you to do the thing you ought to do, then you must now do the other thing you ought to do, and that is you must provide for the just compensation of these lawyers by making your order immediately for the division in kind upon the basis that this court sitting in equity says is a reasonable basis for division of this land between the Indian and the lawyer." [440]

May I just say, in concluding, your Honor, it isn't a pleasant task to fight our government, it wasn't a pleasant task to begin this fight in the face of the St. Marie decision, but I say to your Honor we found our pleasure in the fact that I think that we have lived up to the highest and the best traditions of our profession, and just as when I took my oath, and your Honor took your oath, and Judge Preston said his, we said that we would never turn down the cause of one who had a righteous claim against another, simply because he was unable to provide that monetary return, but we would take care of them. And that we did.

We believed then, and we believe now, if we were successful equity would find its way to compel the Secretary to do the thing that was right and just. And if it doesn't have the power to do it, then I say the Indian Department knows it is perpetuated in its existence and in its tyranny, a tyranny that has become a matter of the greatest reproach and of the greatest shame of anything that has ever happened in the United States of America. It dwarfs in its infamy the slavery of the black man in the south.

And I say to your Honor that we have always felt that even though we go unrewarded we have done more than we ought to do, but we have always felt that our government, acting through its court sitting in equity, will say in the end that no Secretary having the power to divide is going [441] arbitrarily, because of his prejudice against the success of the Indians in this litigation, to say, "I will not make that order to divide, and therefore you can rot and your children can rot after you, and the profession can know in behalf of all Indians that they can't get a dime, then see how many of you will have the nerve and fortitude to come forward and prosecute such claims against the government." I say, your Honor, that is our attitude. We are not aggressors. We come here asking only that which is fair in the evening of the day which has seen done the thing we began to do, and justly began to do more than nearly eight years ago. And had we refused to do it, we would have been justly subject to the censure and the criticism of the bar and of the courts of this country everywhere.

The Court: Gentlemen, I will have to adjourn at 3:00 for today. Would you like to continue the argument tomorrow morning?

Mr. Brett: Yes, your Honor.

Mr. Taheny: Yes, your Honor.

The Court: Are you here from San Francisco, Mr. Taheny?

Mr. Taheny: Yes, your Honor.

The Court: It is your view, Mr. Clark, that the

court should undertake to divide the land between Lee Arenas and the petitioners?

Mr. Clark: We have no doubt of it, your Honor. We think [442] it is the only equitable way to do it. We thought so when the original contract was drawn and so provided in the contract. We thought so when this contract was drawn, which left it to the uncontrolled discretion of the court in fixing a quantum meruit with compensation not only to say what it should be in amount, but what it should be in the manner of its time and payment.

The Court: How would that be done mechanically?

Mr. Clark: Always in partition we are met with those problems, but I think this land admirably is adapted to a division in kind, and we do have, if and when your Honor should indicate such a conclusion, a suggestion to make as to how it should be done. But we think equitably it can be done both to ourselves and to the Indians, and in a way that each of the reserved properties could be integrated as a productive income unit.

We haven't, as I say to your Honor, made any suggestions on that. We did not wish to presume, because your Honor is pioneering in this particular matter. We have the authorities to which Judge Preston has referred, which we think are applicable and controlling here in principle, but the facts here differ somewhat. But, as we say, equity never refuses its relief because of a different and novel or unprecedented situation presented, but it will always so mold its decrees so as to be fair and just.

But when your Honor should indicate, if your Honor does, that that is a proper thing, we then do have a definite plan to suggest to the court as to the matter of partition.

Mr. Preston: I might say offhand, your Honor, that Mr. Clark and Mr. Sallee are the exponents of that doctrine. I haven't put anything in their way, but personally I would rather have the money.

The Court: I will recess the hearing at this time, gentlemen, until tomorrow morning at 10:00 o'clock.

Court will adjourn. [444]

Los Angeles, California

Tuesday, March 30, 1948, 10:00 a.m.

(Case called by the clerk.)

Mr. Preston: May it please the court, I would like to say two or three words about one case before finally closing. I desire to invite a re-examination by the court of the case of United States vs. Anglin & Stevenson. The court no doubt remembers well, but in view of the question propounded to me yesterday or the statement, rather, made by the court yesterday, that these funds——

The Court: That case is in the record?

Mr. Preston: 145 Fed. (2d) 622; United States vs. Anglin & Stevenson et al.

The court stated yesterday that the consent of the Government in the Equitable Trust case was implied, or at least said that the funds were on their way back to the restricted area, held by the Secretary of Interior, and he had previously approved.

That is true. That is not the case in the Anglin & Stevenson case.

Jackson Barnett died; he was a restricted Cree Indian, and his funds, the funds of his estate and his property, I think, as well as some species of actual personal property, were in the hands of the Secretary of Interior. And the Department of Justice—not the Secretary of Interior—brought this suit in the name of the United States to [446] determine the heirship to this restricted fund. The heirs of this fund would also be restricted the same as the decedent Barnett. So this money was in the process of passing out of the possession of the Secretary of Interior and into the possession of the heirs. They were restricted in the Secretary's hands, as I have already said, and they were restricted or would be restricted in the distributee's hands.

The court held in that case, by virtue of the suit by the Government through the Department of Justice, and by virtue of a statute which gave the court that power to determine heirship, that that gave the court complete jurisdiction of the whole fund.

I do not think I expressed myself accurately yesterday in this particular: What we contend here now is that, by the Act of 1894, complete jurisdiction over the allotments involved in a lawsuit by an Indian against the Government comes under the jurisdiction of the court.

The Court: In other words, your view is, as I understand it, that the court having taken jurisdiction of the res, namely, the land——

Mr. Preston: That is right.

The Court: —for the purpose of making the allotment—

Mr. Preston: I started to say “res” yesterday and I had forgotten it. [447]

The Court: —being a court of equity, I may retain that jurisdiction to see that justice is done fully.

Mr. Preston: That is right. And this court holds, further, that the Secretary is bound by the judgment against the United States. That is all I care to say about that.

The Court: Mr. Taheny, do you wish to argue first?

Mr. Taheny: Mr. Brett wishes to argue first.

Mr. Brett: I just want to mark one volume here, your Honor, to save time, and then I will proceed.

I can't begin this statement, your Honor, without paying very sincere respect to the marvelous oratorical statement by Mr. Clark. I know I was moved by it, and I feel reasonably sure that anyone who was present in the court was moved by it. It is one of those gifts that God gives to few of us, and the rest of us can only wish that we had it. I am not, I believe, a jealous man, but I certainly can say sincerely that I would that I had even one-tenth of that oratorical ability in this case or in any other case. Since I do not have it, I will not attempt to essay such a type of argument to the court.

The Court: I suppose that, not detracting from anything that you have said or what was demonstrated here by counsel, it would not be very difficult to feel deep emotion in fighting a case such as this,

where 31 years has passed without a high officer of the United States doing what [448] Congress told him to.

Mr. Brett: I think that is true if the facts are true.

The Court: Is not that a fact? Is not that a fact?

Mr. Brett: I say, if the facts were true. I am not here, and it is not going to be the purpose of this argument, to dwell very long on the defense either of my country or the higher officers thereof.

I yield to no one in my belief in justice; I yield to no one in my belief that we have got a fine country and that, generally speaking, its higher executive officers have done a very fine duty.

The Court: It might clarify the atmosphere if you, speaking on behalf of the Government, could offer some explanation why, when Congress told in explicit terms the Secretary of Interior what to do in 1917, 31 years have passed and, as I understand it, it is conceded that the only Mission Indian who has received an allotment pursuant to that direction has received it, not at the hands of the Secretary of Interior, but at the hands of the court after two trips to the United States Supreme Court. I would like to hear you.

Mr. Brett: That is a very large assignment. But in view of the fact that your Honor has inquired of me——

The Court: Are there any misstatements of fact in that [449] question?

Mr. Brett: Not of fact, your Honor; and there is no criticism of your Honor, because I realize that

you are merely stating what higher benches have said and I am satisfied, in part, was moved by the very type of argument we had yesterday.

The Court: I just want to be sure that my question does not assume any fact. I understand that there is no question but what in 1917 Congress told the Secretary of Interior to allot the land to these Mission Indians. Is there any question about that?

Mr. Brett: May I—I do not ordinarily desire to ask a question in answer to a question, but I feel, before I can answer it in this instance, it is proper. May I ask if you are asking in reference to what we know now or in reference to what we knew in 1917, or even up through 1944? And the reason is this, your Honor:—

The Court: What is the statute? Is it ambiguous?

Mr. Brett: I think it is, because the judge of this court—a judge whom I admire very greatly, but who makes mistakes just like other judges and just like other lawyers—in examining that law the first time that I was in this type of case, the St. Marie cases, in construing the 1917 statute construed it not to be mandatory.

The Court: Well, assuming it is directive. [450]

Mr. Brett: Now, in addition to that, the Circuit Court in passing upon the matter construed that not to be mandatory.

The Court: Assuming it is directory, is there any question but what the Secretary of the Interior should have carried out the Congressional direction?

Mr. Brett: Your Honor, let me answer you as

direct as I can. I will say this, and I want to explain my answer, as witnesses sometimes do. And I say, briefly, that I am not here and it is not the general purport of my argument to defend the United States on specific matters. I want to get down to a lawsuit, but I feel that we should answer some of these statements of such grave misjustice.

Congress in 1917 passed a statute. It passed a statute at the request of the Secretary of Interior at that time—a statute in which there was considerable dispute as to whether it meant this or meant that. The law in effect at that particular time specifically prescribed that the Indians would be able to make a choice or selections for allotment. It was an act to be done by them, not for them and not by anyone, but by them.

If within four years they did not do so, then—and bear in mind that the statute said that the four years had to expire—then it became either the duty, as you would properly construe it, or the power and the authority, if you construe it the other way, of the Secretary of Interior [451] to do something for them as distinguished from their doing it themselves.

Now, it went to 1921. It takes a little time, of course, for executive officers to act. I do not think that by getting the first appointment out, the work done and completed by 1923, in the magnitude of the duties of the Commissioner of Indian Affairs and the Secretary of Interior, we could say that was extremely dilatory.

He did appoint an agent. And this very litigant here, whom I happen to represent and whom I am very proud to represent—I like Lee Arenas as I begin to know him—he was one of the leaders, with a man by the name of Johnny Boudreau (Phonetic), he was one of the elders, one of the leaders, one, I would say, of the most intelligent at that time of the small group of Indians comprising this tribe.

I would say, in addition to that, that they signed the telegram or signed the letter and said: “We don’t want allotments, regardless of how they may have been selected.” These poor Indians have been swayed by so many threats that it is just a grievous shame, and it still is. Nevertheless, the more intelligent ones said: We don’t want allotments, and the basis and reasons that they did not want the allotments was, as they stated, that a good many of these people were not in position to take care of this property.

And parenthetically there, your Honor, irrespective [452] of the respect I give to the United States Supreme Court and the Honorable Judge Garrecht whom I respect very highly as one of the ablest men on our bench, I think if he had gone up there, as I have gone, and seen a number of these tribes, he would never have formed a conclusion that the tribe, as a unit, and each and every one of them, are presently so informed that they are capable of managing their affairs, or if they were given this property in severalty that they would have it 30 days. I submit they would neither the proceeds for it nor the profit within 30 days.

And, as an example, I again parenthetically—and I am going to get back—I have just received word within the last few days, which may or may not somewhat depend upon this case, as I will demonstrate, result in another piece of litigation—I am informed that one of the members of the tribe out there who has been permitted to operate some lands there as a trailer court—another trailer court case—having an income of in excess of \$6,000 a month has let that out to a white man for \$100 a month.

I do not think that demonstrates capability of managing important affairs. But the main thing is this: The intelligent Indians, the ones who were better informed, the ones who had the interests at heart so far as could be seen, opposed this matter.

Now, it is true that between 1923 and 1927 there was a change of heart. I can't tell you how it occurred. I do not know what the influences were. But there was a change, and it is true that this man was instructed to make selections for those who desired the selections, and he did so. And that left a great many out in the cold, because there were still quite a few that did not want any selections, would not have anything to do with it; and that is the unfortunate setup here now. There are quite a number here, relatively 60 members of this tribe, that have no rights if these allotments go through.

Of course, we do not have to decide policy in this court. About that time there began to be various influences on Congress. Now, it may be true, and I think it is true, in a number of those occasions, by the Commissioner of Indian Affairs and by the

Secretary of Interior, and he could have been using erroneous judgment. I do not know.

The Court: Before you leave that earlier statement, aren't all of the members of the tribe entitled to share in these allotted lands?

Mr. Brett: Not if the allotments went through, because there would not be any for them to share in; not if they were allotted in the manner in which these were allotted.

However, your Honor, that is one reason I said I wanted a little time. I want to discuss this later, but I will [454] mention briefly this, because I have asserted it before to your Honor—and I make my assertions in good faith, whether I can always support them or not—I still believe, as I have always believed ever since I have studied this Indian law, that every member of that tribe has and still has and will continue to have, unless Congress changes the law, the right today, tomorrow, or the next day to make a selection of any unallotted lands and to enforce that selection. And I have a reasonable belief, because I still believe that the representatives of the United States in executive capacities, in the main, want to both obey the law and do their duty. That has been my experience with most of them. I have not found any that I could say that affirmatively or expressly have any other view. It may be some may have mistaken views or judgment, or have not exercised what I would think would be proper judgment.

And I think that any of them today, they do not have to go and try to enforce those other allotments.

I am satisfied they do not. I am satisfied that they would simply have to make a selection. I believe that it is reasonable and probable that if they made a selection, the selections would be approved.

Now, why do I say that? Let me again continue. Now, about that time Congress began to get concerned, and it had many, many representations. I assume that those representations [455] would have had various backgrounds, but they resulted in this Wheeler—I can't think of the other man's name—Act, which provided that allotments were to be completely taken away. But there was a condition, one condition subsequent, and that was that it had to be by a vote of the tribe. In other words, the tribe had to accept or refuse to accept.

Now, that, again, took time, even with a tribe of 60 members. But finally the tribe, in this instance, decided that they did not want to have anything to do with this Wheeler bill, which meant that the taking away of allotments—

The Court: That was in 1927?

Mr. Brett: Oh, no; that was subsequent to that, your Honor. That was about in 1934, between 1932 and 1934.

Then very shortly after that, these so-called St. Marie cases. Lee Arenas was not for that St. Marie case. At that time he was against them. He did not want to get in on that. A great many of the other Indians who were, I think, the more intelligent group, did not want to do that. But nevertheless, actions were brought.

Now, the Indian is just like any other litigant. I

would say this: More than any other litigant, I think it is the duty of the public officer, when a matter is submitted to the court, to go very, very cautiously until the courts [456] have had an opportunity to pass on the matter, and then abide by what the courts decide. If there is any one group of the public which should adhere to the rule that this is a country of law and that we should follow the law, it is those of us who represent the people as a whole in what is called the United States of America, or who might be said to be governmental representatives.

Now, there was a hearing before Judge Yankwich. These matters were thrashed out. Whether he decided rightly or wrongly is not important now. The fact is he did decide. It was submitted to him and he decided that these allotments were not proper, that they were not enforceable, and that they were not just; and particularly decided that the Indians were not capable at that time of taking care of their own affairs.

Now, it is true——

The Court: Did he make the decision that the allotments were not just and that the Indians were not capable?

Mr. Brett: I think he did, your Honor, as I recall the decision.

Mr. Taheny: He made the second finding, your Honor, but he did not make the first finding.

The Court: Are not those matters for the Secretary?

Mr. Brett: Sir?

The Court: Are not those matters for the Secretary only [457] to determine?

Mr. Brett: Well, apparently not under the present trend of decisions, although I would say this: The Supreme Court did indicate that the Secretary did not have to find it in a specific way, and that by action he may have been deemed to have found it, certainly.

At any rate, Judge Yankwich did not have Lee Arenas before him. He did not have even the type of character of Lee Arenas before him. He had other Indians. If you had seen those Indians, you would not be surprised that he arrived at the conclusion he did. That is merely in passing. I am trying to explain some of these so-called injustices.

The Government at that point was concerned and confronted with a decision of the court. The matter was taken on an appeal. The only proper and logical thing that I could see, and, I believe, on due consideration, that your Honor would feel it would be proper of a Government official, was to wait and see what the Circuit Court did; and the Circuit Court affirmed it.

This very matter of estoppel that is brought up here was urged in that case and was overruled by the Circuit Court. It is true Judge Garrecht wrote a very vigorous dissenting opinion, but the court decided the other way.

Now, it is true that the United States Supreme Court denied the petition for certiorari because it was out of [458] time. The fact is it was a final decision.

Now, it is true that the matter was again brought. It is true that ultimately the Supreme Court has been called upon to decide and has decided that this Act was mandatory, instead of discretionary, has decided that certain actions of the Secretary were conclusive.

With due respect to Mr. Clark, I would say that I had never heard of an instance before where what he recited had occurred; and I think he is to be highly complimented if he was persuasive enough to get such a statement from the bench, from the judges. But still, with due respect to him, I can't read into the Arenas decision in the Supreme Court or into any decision that I have found yet in either series of the Arenas cases, excepting Judge O'Connor's later lower decision—in which this part I am referring to was not affirmed or even referred to by the Circuit Court—I can't find any holding on the basis of estoppel.

I think the decision on the Arenas question that we are confronted with was based upon two things: One, that the Secretary, by his actions, as discretionary, perhaps, from an express statement, had made findings that these Indians were capable within the provisions of the Allotment Act; and secondly, that once that finding was made, it was mandatory and required of the Secretary that he approve these selections, if the selections were properly made. [459]

That is all I can read in that decision. If your Honor reads more, I can't. There is, of course, a large dissipation of the so-called wrong.

Now, about the time, if the court please, that we finally got that phase of it cleaned up, the Lee Arenas case. I submit to you maybe we used poor judgment. I do not know. But when you are required to exercise discretion and judgment, you sometimes use it poorly and you sometimes use it wisely. The best judgment we could conceive of in the matter, again, in the case was to wait and see what the court did with it.

Now, we took the view, as your Honor knows from reading the memo, that the matter had been disposed of, and we had Judge O'Connor originally deciding with us summarily.

The Court: Was that not Judge Yankwich?

Mr. Brett: Sir?

The Court: Judge O'Connor was not in the St. Marie cases, was he?

Mr. Brett: No. I am now talking about the first Arenas trial.

The Court: The first ruling on the Arenas case was made by Judge Yankwich, was it not?

Mr. Brett: No, sir. No, your Honor. The first holding was by Judge O'Connor, a summary judgment.

The Court: I had the impression that the dismissal [460] was made prior to the first decision of the United States Supreme Court by Judge Yankwich.

Mr. Preston: No.

The Court: I am wrong.

Mr. Brett: No, your Honor. To that extent you are in error. What happened was that within a very short period of time, I think it was within three

months at most after the St. Marie case was final—it may have been even shorter—the Lee Arenas case was begun, and the Arenas case brought in nothing new whatsoever that was not in the St. Marie case. It simply said this: It said that the St. Marie case was decided erroneously because the Act of 1917 was not, as Judge Yankwich had held and as the Circuit Court had held in the major opinion, but was as Judge Garrecht had held in the minority opinion, a mandatory Act instead of being a directory Act. That is all there was in the Lee Arenas case; that is the sole issue, was just a redetermination of an issue of which——

The Court: You are talking about the opinion by Mr. Justice Jackson in 322 U. S. 419?

Mr. Brett: No. I am referring——

The Court: May, 1944, is that it?

Mr. Brett: No. I was referring at that moment to just the Arenas case. I say the Arenas case was a redetermination of the matters which had been determined. [461]

The Court: Are you referring to the first opinion of the Supreme Court?

Mr. Brett: Yes, sir.

The Court: In other words, Judge O'Connor dismissed it upon the authority of the St. Marie cases.

Mr. Brett: That is right.

The Court: The first complaint in the Arenas case?

Mr. Brett: That is correct, sir. Yes, sir.

The Court: Arenas took an appeal and the Cir-

cuit Court, relying upon the St. Marie case, affirmed it?

Mr. Brett: That is right.

The Court: And the United States Supreme Court reversed?

Mr. Brett: That is correct.

The Court: That was in 1944, and then was when the highest court of the land determined that this was a mandatory statute, is that it?

Mr. Brett: That is correct.

Now I want to come to one other point. I am later going to discuss them in detail.

After the Circuit Court affirmed the summary judgment, which included an express holding that there was no estoppel, the Commissioner of Indian Affairs, in cooperation with the Department of Justice, commenced necessary initial proceedings to get things in shape so that we could have a new allotment. We went down and had numerous hearings at which they called [462] the Indians in and discussed with them to try to find out what the Indians wanted. We did not feel, in other words, that the Supreme Court was going to grant certiorari. We guessed wrong. That was the instance of the so-called ejectment suits.

In other words, the Indians, as they have now, were occupying some of these allotments with no conceivable legal right, but we did not disturb them because we were in the midst of litigation and nobody knew what was coming up.

We went down and we talked to the Indians. When I say "we", I did not personally. Mr. Nor-

man Lyttel, Mr. Eugene D. Williams, and some men from Washington. They were consulting with me, and at that time I was in charge of the major office here. We were still in the midst of war and, although I had handled these Indian cases and they consulted with me for whatever it was worth to give them my views, I did not personally go down to Palm Springs because I could not be away from the office. But I was keenly in touch with it. We started all these ejectment suits with the idea that we would get an adjudication; that we would bring the thing right back again as tribal property so that when we did get allotments it would be clear what Congress said to give them. And just about that time, when we got that all lined up, the Supreme Court granted certiorari. It had nothing to do with any reasons filed by Judge Preston [463] or anybody else. It was when the Supreme Court granted certiorari and the matter was again reopened, and certainly we did not want to take any steps that might be indecorous; so we dismissed the thing without prejudice.

The Supreme Court granted certiorari, the matter came back to Judge O'Connor and came back to the Circuit Court. And, as your Honor can tell from reading the opinions, in the main, what those eminent judicial officers thought was simply this: They took the pattern that Judge Jackson's opinion had given, and they simply followed and complied with that pattern.

It is true that certain oral evidence was offered, practically none of it in conflict. An examination of

the file will demonstrate that to your Honor; but I think I could safely say that 85 per cent or more of the matters were in a stipulated pre-trial statement. And, of course, we come out with this decision.

The Court: Is it your view that the law was settled in the opinion by Mr. Justice Jackson?

Mr. Brett: I think the law was settled to this extent: That unless the Government could show some different circumstance then it had theretofore shown, that the law was settled; and there was never any contention that we could show any different circumstances.

The Court: Well, the Government did not accept that [464] decision as final, did it?

Mr. Brett: No; that is true; that is quite true. And, as a matter of fact, if the court please, I think the Government—now, I am not saying that they could not have tried it differently and I do not think they could have done anything except get some adjudication by the lower court, because, after all, when the Supreme Court said that on the basis of the matter as it existed it was not in a position to make a final judgment, it was merely delineating what was to be done if certain facts were shown and had to have an adjudication by the lower court.

The Court: Then after the lower court found, following Mr. Justice Jackson's opinion, that the Indian was entitled to the allotment, the Government appealed to the Circuit Court?

Mr. Brett: That is right.

The Court: And that court affirmed the award of the allotment, and then the Government peti-

tioned for certiorari again—not again, but petitioned the Supreme Court for certiorari?

Mr. Brett: The first statement is absolutely correct. The second statement is only partially correct, in this: The petition for certiorari was by Mr. Arenas and the Government filed merely a conditional petition, saying that if the court did grant it, then it wanted to present certain [465] facts for the Circuit Court to review.

The Court: It was in the nature of a conditional cross-petition?

Mr. Brett: That is correct, your Honor.

Now, if the court please, I want to again get back to this point. The word “justice” is a very important word, one of great disputation, but it is not one in which we can be too dogmatic or which we can too ably define.

I think we all sincerely want justice in this case, as in other cases. To my mind, if the court please—perhaps I am persuaded by my training—to my mind, the gravest possible injustice is to attempt it upon the basis of sympathy and inclination and desire, contrary to the law.

The Court: Of course, sympathy does not have any effect here. I just wanted to hear, and you have made the answer, of the Government’s explanation of the delay up until the time of the decision.

Now, I would like to ask you if the Government has an explanation for this situation: The law in effect says, I think, without any question, that if the Secretary of Interior does not do his duty and make

an allotment, that the Indian has a right to sue and invoke the jurisdiction of this court to get an allotment; and that is what Arenas did. In order to do that he had to employ counsel.

Let us assume that the Secretary of the Interior misconceived [466] the law up until the time it was settled in the Arenas case. There is no misconception on his part now of the law, I take it; there is no misconception of his part now that these attorneys rendered the services which shed the light, so to speak, as to the law in these matters; and there is no misconception on his part but what Arenas is indebted to these attorneys for their services.

As I understand the statute, the Secretary is in position to make necessary provision so that Arenas could, if so advised, compensate his attorneys. It is my understanding that the Secretary takes the position that these attorneys are not entitled to one penny out of the land and monies the Secretary holds in trust for Lee Arenas. Am I in error there?

Mr. Brett: Well, your Honor, I feel that you are. In the first place——

The Court: In what particular?

Mr. Brett: Well, in this particular: In the first place, I do not believe that there has ever been a suggestion by counsel—if there is any, it has not been brought out in evidence, and Mr. Arenas and his wife are here, and I have not been able to find out from them, that a figure of any kind or character——

The Court: I am not speaking of figures. It does not get to figures. My assumption is that the Secre-

tary takes [467] the position that, no matter the figures, these petitioners are not entitled to one red penny from the assets of Lee Arenas held in trust by the Secretary of the Interior of the United States. That is my understanding of the Government's position here. I want to know if I am in error.

Mr. Brett: Well, again, I cannot answer until I have a definition; and I am not evading. If your Honor means this: That the Secretary believes, as I believe, that this property at the present time is still a part of the public domain; that by the existing Acts of Congress neither Lee Arenas nor anyone for him, nor any other person has the power or authority to either alienate it or to affix a lien upon it or to in anywise use it to pay attorney fees or anything else, then I would say that the answer is yes.

If you mean, however, has the Secretary predetermined that if this court, in the exercise of its jurisdiction and after hearing this evidence, has fixed some award, that the Secretary will not cooperate to find some manner in which the award can lawfully be paid or, putting it the other way, will actively cooperate with Mr. Arenas to prevent the payment of the award, then I feel, if the court please, that there is no basis for such a conclusion; that there is no evidence to support it; and that it does violence to the ordinary rule that we will presume, at least, that officials will act in good faith, will exercise their best judgment [468] and will be innocent of wrong.

The Court: Now you are misunderstanding me entirely, I think.

Mr. Brett: I am not.

The Court: I want to know what your position is as to what the Secretary's view is—not with respect to what will happen if a judgment is rendered, but what his position is now at the bar, before judgment. Is it that these attorneys are not entitled to one red penny of lands or funds held by the United States of America in trust for Lee Arenas? Do I understand that correctly?

Mr. Brett: Now that you have defined it in that way, I would say this: Not that the attorneys are not entitled to be paid, but that they are not entitled, as you said—and I try to repeat it aptly—one red penny of any monies which the Government holds in trust, nor to any interest in the lands which the Government holds in trust, because there has been no consent by the United States in any form or manner that it should be surcharged.

The Court: Of course, the United States is the adversary. Is it to be supposed, or does the Secretary contend that Congress provided this remedy for the Indians, this remedy in the courts, knowing that to achieve a remedy in the courts the allottee must have a lawyer, and knowing the maze of legal difficulties in the Indian affairs, that [469] Congress provided a remedy for the Indians and made it so hollow that he could not hire a lawyer and pay him out of the recovery?

Mr. Brett: Well, now, if the court please, I would answer that in this way: In the first place,

I think—I see that in the main you are following the suggestion of Judge Preston—but I think that——

The Court: I am not following anyone's suggestion about it. These are questions in my mind.

Mr. Brett: I see. I will endeavor to answer them in this way:——

The Court: As I understand the law, and I want to be sure we are talking about the same thing.

Mr. Brett: That is right.

The Court: It is not easy to wade through all these statutes; it is not for me. It is a hodge-podge. We not only have the exceptions in the statutes but we have the exceptions of the tribes and the exceptions of the circumstances and exceptions upon exceptions in the statutes.

Mr. Brett: That is true, your Honor.

The Court: And that requires skill, I think. It seems to me so, to wade through these.

As I understand it, the Secretary of the Interior today, if he so desires, could release Lee Arenas' land from this trust to the same effect as if the President of the United [470] States had said so. Am I correct in that?

Mr. Brett: That is true.

The Court: He can release all or any portion of it?

Mr. Brett: That is true.

The Court: Which is to say, he can make all or any portion of them free and clear and available for Lee Arenas to pay what he owes, if he so desires.

Mr. Brett: That is true.

The Court: In the same way, of course, he can under Section 403 of Title 25—that authority I am referring to, I take it, is contained in Section 404 of Title 25.

Mr. Brett: Just a moment, if the Court please.

The Court: Dealing with the sale, on the petition of allottee, of the res?

Mr. Brett: I think that authority is contained in Section 392 more specifically, but I will have to look at them.

The Court: Yes; you are correct. 392 specifically covers it.

Mr. Brett: Yes, sir.

The Court: That is the Section I was hunting for.

Mr. Brett: That is right.

The Court: Then follows such sections as 403, dealing with leases; and, as I read the Section 403, the allottee may give a lease up to five years and take all the proceeds. [471]

Mr. Brett: That is correct.

The Court: Now, an allottee is entitled to occupy the allotted land.

Mr. Brett: That is correct.

The Court: Is that his legal right?

Mr. Brett: Yes, sir.

The Court: If he is entitled to occupy the allotted land, is he entitled to the use and occupation of it?

Mr. Brett: For certain purposes.

The Court: Namely, the rents, issues and profits of it?

Mr. Brett: For certain purposes only; yes, sir; for the purposes of farming or for the purposes of residence. He may also, under regulations which are permitted by another Act, have a limited right of use for business purposes which are subject, however, to control of the Secretary of Interior; and, as I stated yesterday, he is limited to the extent that whatever transaction of that character is made is subject to a 30-day revocation clause under present existing regulations.

In other words, we give a five-year lease, by name, but actually, the lease is required mandatorily to contain a provision that it may be terminated at any time upon the discretion of the Commissioner of Indian Affairs or the Secretary on 30 days' notice.

The Court: Wouldn't it be strange law, in your opinion, [472] that the adversary in litigation would withhold the rewards of the litigation and could, even if unsuccessful for him, at the conclusion of it prevent anyone from using the reward of the litigation for the purpose of defraying the expenses of it?

Mr. Brett: No; I would not say it would be strange law. I would say I would agree that it may, perhaps, be regarded as being stringent, but it is not strange. And let me point out why I say it is not strange.

It is axiomatic, if the court please, not only in this court but in all courts, that so far as a sovereign is concerned—and we are dealing here with

the sovereign's property; this property is still public domain.

The Court: In trust.

Mr. Brett: The trust patent, by all of the constructions that have been made by the Supreme Court, is nothing more than a mere statement. The Court has said it is a piece of paper; that if certain conditions subsequently to occur, the Government will do certain things, but reserves to the Government—

The Court: The Government does not claim any equitable title in these lands, does it?

Mr. Brett: Sir, the Government claims all the title in the land subject only to this: That if in the discretion of the officer, at a later date it is decided to transfer the land unrestricted, it will be transferred. [473]

That is so stringent, if the court please, that we have a most unusual situation that I do not know of it in any other branch of law with regard to realty. It is so stringent that even if the United States, by the Presidential signature and with the United States Seal, gives a complete unrestricted patent to the Indian, so long as he remains a member of the tribe and so long as the property remains vested in the Indian, Congress may at its discretion and without violating the Constitution reimpose either the same restrictions, additional restrictions or any restriction.

In other words, it is Government domain. It is on that basis that the United States Supreme Court, in the case of *Minnesota vs. United States*, decided

that it was public domain and was not subject to the law of eminent domain, not subject to the use of eminent domain by the state because it was the public domain.

Your Honor asked if it was not strange, and the reason I——

The Court: Would you say that Congress could constitutionally take this land that belongs to the Mission Indians and give that to the Crees?

Mr. Brett: Absolutely, yes, sir. I see the Indians here and I do not want to be quoted in the Palm Springs paper as saying there is any such intention. You are asking [474] me can they do it?

The Court: Yes.

Mr. Brett: It is my opinion, if the court please, that Congress tomorrow could do just what is to be proposed to do in the Butler Act, although I do not think, personally, the Butler Act will go through—could take every inch of that ground, including Lee Arenas' land, and transfer it by public sale or in some other form, and turn over some other lands to these Indians.

The Court: After declaring a trust for this tribe of Indians?

Mr. Brett: Yes, sir. Not only can Congress do it but Congress has done it in the past. Congress has removed the Indians from one place to another.

The Court: Yes. And after declaring a trust for a particular tribe, then take it away from the tribe later?

Mr. Brett: That difficulty is, if the court please, that that statement of "declaring a trust", just like

the declaring of a patent which was referred to in *United States vs. Jackson*, is a rather unapt term. It is not a declaration of trust, as I understand it, where the trustee's powers are almost entirely in his discretion and the beneficiary has the extremely limited right, the only right that is vouchsafed the so-called beneficiary in this case, that under limited conditions they can get what is called a [475] so-called trust patent, and even when they get that, their rights are so strictly limited there is very little, as your Honor pointed out yesterday, that could be done on it. You can't borrow on it; you can't sell it. You can only make limited use of it, and it is extremely restricted from any beneficial interest, if it rises to that. Some courts have said that it does, but, as I say, I think it is a very unapt definition.

The Court: An allottee has some interest, hasn't he?

Mr. Brett: He has an interest to this extent only, if the court please: He has an interest that would be exclusive of someone else who is not entitled to an allotment.

The Court: He has an equitable interest to enforce the allotment, doesn't he?

Mr. Brett: Oh, yes; he has that interest.

The Court: And this is an equitable proceeding, I take it, without any question, and Lee Arenas comes in and invokes the equitable jurisdiction of this court under Section 345 of Title 25.

Mr. Brett: Your Honor, of course, realizes that I take a different view, and I may be in error.

The Court: Have you considered the cases cited

by Mr. Justice Jackson on page 430 of 322 U. S., of *Hy-Yu-Tse-Mil-Kin vs. Smith*, 194 U. S. 401, and *United States vs. Payne*, 264 U. S. 446? [476]

Mr. Brett: I think I have; yes, sir.

The Court: Those cases were cases under that Section and the question was not there, but it is implicit, isn't it, throughout the opinion that the court is dealing with a decree, which is an instrument of a court of equity, and that the whole nature of the proceeding is not legally in the sense of an action at law but purely equitable in nature?

Mr. Brett: That is true.

The Court: And the very action to declare this allotment is equitable in its nature, isn't it?

Mr. Brett: Well, your Honor, it would not be of any particular profit for me to repeat I do not think so, but your Honor has held that way and therefore I am trying the lawsuit on that theory as far as this court is concerned. Let me get back just a moment. Your Honor a while ago referred to strange condition. First, let us examine it in the light of other situations which are at least somewhat similar.

The Court: Wouldn't it be equivalent—before you proceed to do that, I just want to interrupt a moment. When I say “strange”, wouldn't it be equivalent and so to hold, to hold that the Secretary who loses a lawsuit under a Section 345, Title 25, he loses a lawsuit and he doesn't like it, so he says: “We won't pay the lawyers. I hold all the money.” Isn't it just in effect repealing Section 345 as [477] a practical matter?

Mr. Brett: I do not think so.

The Court: If the court should say to the Bar of this country: No matter how many times you go to the aid of an Indian under Section 345, unless the Indian himself, apart from the Secretary of Interior—which is unlikely—has some funds of his own, you shall not be paid and cannot be paid without the consent of your adversary to the litigation?

Mr. Brett: Your Honor, I agree that that seems harsh at first glance, but let me review it with you in this respect: As I pointed out in the brief, the considered judgment of Congress throughout, although it has vascillated in many ways, has been that these Indians need the protection to such an extent that when the property is finally turned over to them they will know how to take care of it properly. And I realize that that may seem long, but to me there is that purpose, that it be turned over to them completely free and clear of any encumbrances or any transactions which will change the character of it so they will not get the whole that is intended for them.

Let me just indicate one thing: That a decision such as you have just indicated here has been asked and the man, Judge Preston, has frequently adverted to the fact—which is not applicable here, fortunately, but is applicable in many instances to the United States—that when the United [478] States comes into court it is an ordinary actor like everybody else and is subject to the ordinary jurisdiction and is subject to everything that any ordinary litigant is, and that is fair and is proper.

We have numerous problems down in Palm Springs there which we have been very hesitant to touch upon in view of this situation which we have been facing. We saw it when we wrote our briefs, and the Circuit Court said: No; you will just simply bring something in that is not in the case. There isn't any indication, as evidence in this case, that they are going to try to reach any property of the United States; and I think probably they were actuated by the fact that the contract specifically said, in language, that the attorneys were not looking to anything that was property of the United States or income from the United States.

But let us just see what would happen if, by chance, your Honor would make the decision that is asked here and it should be affirmed. These Indians, as I have said, have heretofore been and are now the subject of many, many attempts to victimize them out of property and property rights. Not all lawyers, not all agents, and not everyone dealing with those Indians are of the high moral character of the petitioners in this case, whom I admire very greatly.

It would mean this, if the court please: That the moment I would come in, that is, that the United States would [479] come in here and seek any relief in connection with that reservation, thereafter we are putting ourselves on the plane with anyone else's attorneys. And the lawyers say: Well, here we have to defend these Indians; they have no money; so we made a contract with the Indians, and we figured that if we could defend them that they

would get such and such, and then the court would have that same power that is asked here. If you have the power at all, you have the right to use it to its fullest extent to aid indirectly——

The Court: The court would not award any improvident amount, you do not assume, do you?

Mr. Brett: Irrespective of whether you award an improvident amount or what you award, you would be doing indirectly what Congress, as a matter of policy, has said should not be done; you would be taking that land and distributing it in due course to other parties than the Indians.

The Court: Well, Mr. Brett, you have said here not only in this case but in that Belardo case which you tried, that as far as you can see there is nothing to prevent all these Indians, under that Statute, from going and standing on a piece of land and saying: "I choose this and I want it allotted to me as my fair and equitable share of the tribal property pursuant to the Statute," and asking the Secretary of the Interior to make that allotment.

Now, experience has shown that he won't make it, very [480] likely; that he will have to be forced by the courts, pursuant to Section 345, to make it; and that is what Congress said was the Indians' recourse.

Now, as a practical matter, what lawyer would take the case if it is said to be the law that a court of equity, having assumed jurisdiction of the res for the purpose of doing a very drastic act with respect to it—this court has in the Arenas case picked

up certain parcels of tribal property and said, "Those go to Lee Arenas," hasn't it?

Mr. Brett: That is right, except that it is only——

The Court: All right. Having that jurisdiction of that land to say that, would not a court of equity have jurisdiction of this fund, if you please, the res, for the purpose of charging it with the costs of that recovery by Lee Arenas?

Mr. Brett: No, your Honor, because—in the first place, I said, "Yes," but I did not want to interrupt your Honor. But I have to modify my affirmative answer. All that the United States has consented to, all that the court could possibly have said under its jurisdiction—because, no matter what it says, the court can't have a judgment that goes beyond its jurisdiction. I think that would be conceded. Now, all the jurisdiction that is granted under Section 345 is that the decree shall have the same effect as if the Secretary had approved the allotment. [481]

That does not mean that the decree gives Lee Arenas the right which Congress has said he can have or any other Indian can have, until the President or the Secretary of the Interior gets to the point where they feel it should be granted, and that is a restricted fee title. All that he could possibly get and all that this series of judicial decrees can give him is the effect of a trust patent.

As a matter of fact, if the court please, as I pointed out in my brief, these attorneys have not even procured that for him, because the Section does not say that he gets a trust patent. It says it

is the same as the approval of an allotment. They still have not applied for the patent. The patent still has not been issued. I verified that.

The Court: They may want to know whether they are going to be paid up to this point before they have to mandamus the Secretary of Interior, perhaps, to issue a trust patent.

Mr. Brett: May I continue just one moment?

The Court: I appreciate all the probable improvidence on the part of the Indian, but the court is supposed to protect against that.

If you take the other view, that the court has no power, having jurisdiction over this property for the purpose of making an allotment out of tribal lands, has no jurisdiction to charge it with the costs of doing so——

Mr. Brett: Precisely. [482]

The Court: ——which is an inherent judicial power of a court of equity, then where will the Indians—take the Palm Springs Indians, alone, who are faced, as you say, with considerable litigation involving their properties down there—where are they to get representation?

Mr. Brett: Well, if the court please, I would answer you directly this way:——

The Court: Before you answer me, let us take the morning recess and give the reporter a little relief.

Mr. Brett: Yes, surely.

The Court: Five minutes.

(Short recess.)

The Court: I was detained in chambers, gentlemen. I am sorry to have kept you.

Mr. Brett: I wonder if the reporter could read me your Honor's inquiry? I think I have it in my mind, but I would like to be sure. I am hoping in due course, your Honor, that I can get down to what I have in the way of a main argument, but I am going to endeavor as far as I can to answer.

The Court: You may delay that if you want to.

Mr. Brett: No. I am going to answer it right now.

The Court: I never intended to proceed past the point of hearing whatever explanation was to be made on behalf of the Secretary of Interior for his position in the matter adversary to the petitioners.

Mr. Brett: I am going to endeavor to answer that. Your Honor can realize, of course, that this is a broad subject and it is not always easy to answer some of the questions. I would answer you this way:

The Court: There is no sentiment in the situation that ordinarily arises in an equity case where someone sues and recovers a fund, as to charging the fund with the costs. Courts of equity have always charged the fund with the cost of the recovery; isn't that true?

Mr. Brett: But that is not true in this case.

The Court: That is my question: Why isn't it true here?

Mr. Brett: All right. It is not true in this case for this reason, if the court please: In the first place, there is no res that is in the hands of the

court or to be administered by the court. The only thing that the United States has consented to by Title 25, Section 345, is a form of special proceeding, perhaps you would say, in personam between the Indian litigant—and he is the only one who can be the litigant as plaintiff—and the United States to determine one fact only, and that is, have such acts and circumstances arisen that entitle him to an allotment.

Now, just let me expand that further. This court, even despite the decision that has been made here, does not have before it and has no jurisdiction over either the United States [484] or the Secretary of the Interior, for example, to enforce the issuance of that patent.

Now, I do not mean by that that no United States District Court has. I mean, which has the instant venue in this proceeding, hasn't that. But if there is, assuming that which I think is a violent assumption, because I think, upon application, the patent will be issued, but this court, nevertheless, if the Secretary should arbitrarily or virtually say: Well, despite all this matter of judicial action that has been taken, I am not going to issue it, his official residence is in Washington, D. C. and the only jurisdiction that exists to enforce the issuance of the patent is in the forum in that jurisdiction at Washington, D. C. There is nothing else that this court may do with reference to the property because this court has no jurisdiction of the property.

The Court: Has not this court, as between Lee Arenas and the other members of the tribe, reached

the judicial arm down to Palm Springs, if you please, and out of all the tribal lands, said, "Lee Arenas, these are allotted to you"? Has not the court in effect picked up those lands and said, "Lee Arenas, these are allotted to you as between you and all other members of the Palm Springs Band"?

Mr. Brett: I do not think so, your Honor.

The Court: And in that sense has not the court acted [485] in rem?

Mr. Brett: I do not think so. I do not think that this judgment is justicative in any respect as to other Indians of that tribe. I think all that this court could do and all that this court has done is said: As between Lee Arenas and the United States, that conditions precedent have been performed so that this Indian is entitled to an allotment. And the situation exists the same as if the Secretary, who had the authority and the duty to determine those facts, had made those determinations, and stops right there.

And I think that if there is any other remedy, equitable or legal, that the best language I could give you is the Circuit Court of this particular Circuit in the Eastman case, where there was sought from this same District Court equitable remedies by way of injunction from interference with an allotment. It said this—I have quoted it in my brief:

"The trial court thought that leave to sue the United States is found in the Act of August 15, 1894, as amended, 25 U. S. C. A. Section 345. We are not able to agree. It is plain from the whole

Statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have [486] already been made. Should the view taken below be approved and the scope of the Statute thus enlarged by judicial construction the Government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right to sue the Government for the redress of grievances of this character is solely a function of Congress. * * * ”

Now, I think, if the court please, that this exactly relates to the remedy; that the remedy here resides in reference to these petitioners, if Congress has given an inefficient or insufficient remedy, Congress is the only locality, it is the only authority that has the power to give additional remedy. And I think that it is properly so, and I would like just merely to add this, and then I will go to the main phase of my argument.

Let us assume, if the court please, that this reasoning that has been urged here is sound; let us assume that despite the fact that Congress has said at this time that unless an executive of the United States, to-wit, the President or one of its chief executive officers, to-wit, the Secretary of Interior, in their discretion shall determine that an Indian shall have more than just the right to occupy and a limited right to use—which is a trust patent—that there is vested in the Indian the power, directly or indirectly, to make arrangements with counsel or with anybody else in the assertion of just rights, if

you please, the result of which ultimately will be this: That it will be paramount to or supersede the discretion and judgment of those whom Congress has entrusted with that authority, and will seize these lands and will not give them as Congress has said they shall be given, merely in the form of a trust patent, once released by trust officers, but would give it to them in fee, because that would be the ultimate result.

On this rule of law that is here sought upon the theory that there is some equity that justifies it—and I will endeavor later to show that there is not in this case—but if it be said that there is such a rule and that this court has this jurisdiction, there is nothing whatsoever, as I see it, to prevent this following: That those who may be so minded may negotiate with the remainder of the Indians, deal with them as they may desire. It is true they will be subject to the court's approval as to percentages, but percentages are not important, whether it is 10 per cent, 25 per cent, or one-third as here requested.

The Court: Do you mean that?

Mr. Brett: Sir?

The Court: Do you mean that percentage is not important?

Mr. Brett: I mean that a percentage is not important to [488] what I am now going to urge. In due course the net result would be this: Not that these Indians, if the court please, would get trust patents, but that these Indians would get partial trust patents to a part of the property and other people would get fee patents, because that is the

ultimate result of saying that this court or any court has the power by virtue of the fact that the Indian contracts and by virtue of the additional fact that despite the law which says that he can't sell or alienate his land, but because he has no other assets that he can then indirectly and circuitously make an arrangement through which the court can do what he cannot do, to-wit, free the lands of these restrictions and turn them over to other private owners.

I submit to you that once we establish that theory the rest follows, and it will follow without any question in due course. And some percentage, whether it is 10 per cent or 25 per cent or one-third, or whatever might be the determination of the respective judicial officers upon the representations made, the 60 Indians which compose this tribe will not get the lands that are set aside there to actually be transferred to them, but they will get only a part of those lands, and the remainder of those lands will be freed from trusts and will get into white hands or into some other ownership.

The Court: Let us test that just a moment. The only [489] suggestion here, irrespective of the arrangement the Indian makes with the attorney, is for the court of equity to make an award out of a fund recovered. The arrangement made between the Indian and the lawyer has no bearing, except it might be the point if a court of equity were inclined to award more as a reasonable fee that it would be an upper limit, certainly not a lower limit.

The only case in which an award would be made under the theory urged here by the petitioners is a

case in which an Indian has sued the Secretary of the Interior and the court has found that the Secretary of the Interior did not do his legal duty.

Now, are you suggesting that the Secretary of the Interior is going to continue not to do his legal duty and that these Indians will have to sue and will recover? It presupposes success in the courts they will recover, and for that reason they will lose a part of their inheritance, so to speak, or their tribal rights.

Mr. Brett: If the court please, that is not the gist of this action. The gist of this—not of this “action”—I should say of this theory that is here espoused is this: The Indian, being an indigent and having no other means, has to have a lawyer to protect his rights, whether it is either to safeguard them, to get them back, or to defend them; that by virtue of that fact it is contended here that there [490] is a rule of equity that if the lawyer has to rely upon that victory and is successful and brings into the court for the benefit of the Indian, or defends the Indian—because those same rules apply to defense as well as an affirmative right—then there is a charge legally that is available.

The Court: Courts of equity have always imposed it. In the Ticonic Bank case there was no arrangement at all. There was no showing but what he might have been a millionaire, he might have been able to pay the fee, but the court said it was only equitable to charge that fund with the costs of his recovery.

Mr. Brett: I realize that.

The Court: That is the theory, isn't it?

Mr. Brett: I realize that. Now, let me just make the answer to what you said a moment ago. It would not only be if Indians were forced to appeal under 345. Let us suppose that the Department of Justice, in behalf of the United States, for the Commissioner of Indian Affairs brought an action upon the theory that an Indian was exceeding certain rights that he had under his trust patent; let us assume, for example, that the Indian has done, as many of them are doing because we are still confronted with this litigation and we do not know just what way to jump, and they make 25-year leases to people, which are absolutely illegal, but [491] the Indian, however, makes them; he receives some funds; and let us suppose we attack it and the Indian says: "Now, wait. I am getting an income from that. I want to protect that right." So he goes to a lawyer. The lawyer says, "Well, all right; under the rule that is now established, if I succeed for you, I will be able to establish to the court that I am bringing about certain results favorable to you and then the court can award me a lien upon this and in due course I can get part of this property sold."

The Court: That would mean the Government was wrong, would it not?

Mr. Brett: That is true.

The Court: Would there be any harm in such cases of providing thus a means for an Indian to defend himself against the wrongful acts of his government?

Mr. Brett: I can't say "that is true." I can only

say, if the court please, that the law I have found does not accord; that the law is to the effect that if a particular act is illegal or against public policy, then the court cannot supplement it; and that is what is asked here.

The Court: The Secretary of the Interior takes the position—I am talking about policy now, not law—the policy of the Secretary of Interior is, as I understand it, asserted in this action. I assume that the Secretary would say that these attorneys have earned something; that Lee [492] Arenas owes them something.

Mr. Brett: That is right.

The Court: But he says: I stand here with the legal power to pay them, to give it all, if necessary, to satisfy Lee Arenas' just debts, but I will not give anything. Hasn't Congress said in effect, or hasn't Congress entrusted to the Secretary of Interior the power to enable this Indian to pay a debt of honor and justice; and the Secretary of the Interior, doesn't he say, "I will not perform that duty?" Is there anything left for Congress to do?

Mr. Brett: Yes. Yes, if the court please, because at present Congress has given him that in his discretion. Now, let us distill that argument.

The Court: Mind you, I am not referring to amount.

Mr. Brett: No; I understand that.

The Court: If the Secretary of Interior came into court in this proceeding and said, "Yes; we concede that these attorneys have served Lee Arenas successfully and we will concede he owes

them a reasonable compensation for their labor, but we cannot agree with them as to the amount," that is one thing. But the Secretary of the Interior's position here, as I understand it, is not that. He says: "Ah! Sure, Lee Arenas owes you money, but you are not going to get my help in paying a penny of that."

Mr. Brett: Now, if the court please, will you either [493] indicate to me where in the briefs or where in the pleadings there is any such statement?

The Court: No. But that is what I am inquiring about. Am I in error in the position of the Secretary of Interior here?

Mr. Brett: I think you are. In the first place, of course, I have not inquired and have no reason whatsoever to know. But I will say, without having made specific inquiry, that I have no reason to believe, since the Secretary of Interior, through the Commissioner of Indian Affairs, has allowed Lee Arenas to occupy and use that property—well, ever since Lee has been old enough to do so—without interference, long before the Allotment Act, and since there is an income to be derived from that land, I have no reason whatsoever to believe that if your Honor makes an award, that the Secretary will not, I do not believe, confirm any sale of the property or any lien, unless the Supreme Court ultimately says that we have to. Because I say we feel that we would be violating public policy, and that we are defending not only the Indian but the public rights. But I have no reason whatsoever to believe that if your Honor fixes a sum which, in your opin-

ion, is the just amount to be paid to these attorneys and they have earned fees, that the Secretary will in any way deny it, if you want to use that term, with the Indian or associated with the Indian to [494] prevent him or to aid him from devoting the fees which he would be able to get from the use of this property to pay that judgment. I can't conceive of the Secretary of Interior taking that stand.

The Court: Is not that the position he is taking here?

Mr. Brett: Not at all. We haven't—

The Court: That this court has no right to make any determination at all of the fairness of this fee?

Mr. Brett: Your Honor, if you find that—

The Court: As far as the Secretary of Interior is concerned?

Mr. Brett: Oh, now, that is true. You can't bind the United States, because the United States has not consented to be sued. You can't bind the Secretary of Interior because you do not have jurisdiction over the Secretary of Interior.

I do not believe that any judgment you can make here—I say it sincerely—can bind the United States or can bind the Secretary of Interior. But I do believe—

The Court: Your position is this, isn't it: That if the court renders a judgment and the Secretary of Interior likes it, he may pay it; if he does not like it, he certainly won't pay it unless he has to? Is that a fair statement of the Secretary's position?

Mr. Brett: Well, your Honor, I have no means of answering that affirmatively or to the contrary. I

do not [495] believe, however,—I do not know the present Secretary—but I do not believe that that is the spirit that would move him and that would be the action of the Commissioner of Indian Affairs.

The Court: How can we discuss policy, then, if you do not know what the policy is?

Mr. Brett: I do not think this court can——

The Court: You are arguing considerations of policy.

Mr. Brett: No, your Honor.

The Court: In arguing what the law should be.

Mr. Brett: No; I am not, your Honor. I would like to get down to arguing what the law is and merely research——

The Court: We will go ahead at 1:30.

Mr. Brett: May I just merely answer this before we lose track of it? I do not believe that the Secretary of Interior will willfully and arbitrarily determine that he will not abide by any decision of this court. I do believe that probably if his counsel advise—and I would, of course, be one, but not the only one—that we feel, for example, if your Honor should determine that the 10 per cent provision is not binding, and we feel that under the decision it should be reviewed, he would probably ask it to be reviewed until it is finally determined.

If we feel that the amount which your Honor fixes would be excessive—and it would have to be extremely so because [496] you have very broad discretion—we might possibly review that; and it may be that there will be no review, because I cer-

tainly have great confidence in this court and I think it will be reflected by my stipulation.

The Court: I am not concerned with that. You have said, as I understand it, that there is a great latitude in determining what is the reasonable fee for counsel.

Mr. Brett: That is right; yes, sir.

The Court: During the noon hour I wish you would think of this: If we are to consider policy, should not the court be on the liberal side of what is reasonable? I mean laying aside the question of whether that first contract fixed the limit, the maximum limit; assuming it does not, should not the court be on the upper side of what is reasonable in order to encourage lawyers, in view of the history of this situation, to encourage lawyers to aid these Indians who manifestly need assistance to handle the Secretary of Interior, if policy is to be considered?

Mr. Brett: Your Honor, I will try to answer that.

The Court: Very well. We will recess until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day, Tuesday, March 30, 1948.) [497]

Los Angeles, California

Tuesday, March 30, 1948, 1:30 p.m.

Mr. Brett: Your Honor addressed a question to me just before the adjournment. The substance of it was: Didn't I believe that in view of the fact that it appears that the Indians would sorely need legal

assistance, and that at least past developments indicate that that assistance might be rather arduous, and that the obtaining of ultimate compensation might be a considerable problem—I am embellishing your question as I understood it—was it not my opinion that the court arrive at the conclusion as to the compensation, assuming that he did not sustain the position which, in due course, we are going to make, that they had bound themselves by 10 per cent contract, should you not be liberal?

My first inclination, I feel, as a Government official would be not to answer it.

The Court: You do not need to answer it unless you wish. What prompted any question was your statement—and I think it was a very fair one—that we speak of reasonable fees; but that is not a pin-point proposition; it is a range, as you have pointed out, a considerable range in the field of what is a reasonable fee for given legal work, and the court can take a view way down here toward the bottom in range to the low end of the range, or the [498] court can take a view up toward the top end of the range and either one would be correct under that view, would it not?

Mr. Brett: That is correct.

The Court: So my question was, under the circumstances here and as long as we were discussing policy—and I could add to that another ingredient, too, and that is in view of the strong probability already indicated that these petitioners, if they are awarded a fee, will have to contest for it again through the Supreme Court—and laying aside the contract for a moment, the 10 per cent contract, as-

suming that that contract was no longer in force, should not the court make its award toward the upper side of the range of reasonableness rather than toward the lower side? And you do not need to answer it.

Mr. Brett: After consideration, I have decided that I feel I would like to answer it very briefly. We have to some extent, it is true, discussed matters of policy, although I do not believe that matters of policy, as such, have any real place in this case, excepting to these two points: I feel that in justification of the Government's position it was appropriate to inform your Honor that this supposed controversy and supposed abuse was not a one-sided question, and I tried to delineate that.

Secondly, I feel that where one is asking the court to explore into a new field and to, as Mr. Clark put it, adapt the remedy to the circumstances required, as we do [499] in equity, that one of the things to be considered is what would be the ultimate effect of establishing that policy.

The Court: That policy is a proper consideration, is it not——

Mr. Brett: I think it is.

The Court: ——in determining which direction or toward which result a statute should be construed?

Mr. Brett: I think it is.

The Court: One of the considerations would be: If you construe it this way, you will reach this result; is that sound, is that sound policy; isn't that it?

Mr. Brett: That is right.

The Court: Or, another way of saying: Is it just?

Mr. Brett: I think that is appropriate, although, as I was endeavoring later to demonstrate it, I am going to try to make it as succinct as I can when I get to that point. It is the Government's position, and it will be my position for the Government, that this matter of policy has nothing to do with this case; that it is a strict matter of law; that the law is clear and the court has only to follow it.

The Court: You are arguing consideration of I do not feel, however, that the question the court has given should be answered affirmatively or it should be answered negatively, for this reason: In the matter of fixing fees, I feel that the total of what the court should [500] do should be limited to this particular case and these particular services. I mean I think that only goes to something that these attorneys have done in this particular case. The court should view that and, using its best judgment under the circumstances that are delineated, come to its conclusion.

I do not think, however, that this should be utilized in either of these two phases, either to assume adverse action—and, I might say not only adverse action but willfully unjust action on the part of the United States—or to assume that this should be a standard which should invite other similar actions on behalf of Indians and their lawyers. I do not think——

The Court: What I had in mind, I was prompted by your statement this morning to the effect of the dire consequences that would entail, not only in this

matter but in the cases of other Indians, if the court should adopt the rule or the construction of the Statute asked for by the petitioners here.

Mr. Brett: I will endeavor——

The Court: I do not suppose we could close our eyes to the consequences of any rule, could we?

Mr. Brett: I do not think, if the court please, that we can fairly at this time assume dire consequences on behalf of the petitioners. [501]

The Court: Didn't you say this morning that if I should follow the road outlined by the petitioners, that other Indians would become involved with lawyers and lose part of their tribal territory?

Mr. Brett: Oh, I did not understand your Honor's comment. I do sincerely say that, and that is the reason I do say that in considering policy and considering that, I felt it was proper. I feel as certain as my name is Brett, if the Court please, if it can be established that there is a power in the judiciary when Indians engage in litigation with the Government, regardless of what may be the merits, because the Government, after all, can guess wrong the same as others——

The Court: But you have to assume the Indians are successful.

Mr. Brett: That is right. But the mere fact that they are successful does not necessarily mean that you would want it said in every single instance involving Indians and the Government that the Government should feel it would have to take its chance on questions that are very debatable; that the Government would have to take this chance: Either it

should stand by and let go on what is going on, which might be completely detrimental in fact to the Government and the Indians, as the Government views it, and unlawful, or the chance that they may misconstrue the Act or some court may [502] construe it one way and another reverse it and construe it another, as happened in this case.

And then what they do is place themselves where the Government's supervision is made subject to varying opinions of varying courts—and I am not criticizing them—but we have to recognize that various judges arrive at various views, each of which would result in the ultimate.

The Court: The ultimate what?

Mr. Brett: Well, justice, in the sense that a judgment of course is presumed to be just, but it would not necessarily be just to the Indians, in my opinion, and I do not believe it will be in the considered opinion of this court.

The Court: What is the alternative, Mr. Brett?

Mr. Brett: The property which they are entitled to eventually and which they are to have on a trust patent, that such should be taken from them, and that would be the result of what is being proposed.

The Court: The alternative, then, is that the Indians shall meekly take as being the law anything that the Secretary of the Interior or his subordinates say, isn't that it?

Mr. Brett: No. If your Honor please, there are definite statutes which say that they can make application and have it approved for fees in advance, if it is going to affect governmental lands. [503]

The Court: In litigation such as this?

Mr. Brett: Sir?

The Court: In litigation such as this?

Mr. Brett: In any litigation involving their government lands or government properties there is a specific statute to the effect that you may apply to the Office of Indian Affairs and have a contract approved. The reason, it is true, that the application was made here, but it is pointed out in that letter which is in evidence, the apparent purport was to say that they were not looking to the Government and did not intend to seek anything from the Government. Therefore, under those circumstances the Indian was *sui generis* and he could make his own contract.

It was pointed out if they did want to seek anything from the Government, then they could modify it and have it approved. It is a common circumstance that goes on, to get such arrangements approved.

Furthermore, I think it is one of the elementary principles, if the court please, in guiding the dealings with this Government that you have to assume that the Government is going to carry out and perform out, and that Government officials are going to act in good faith.

I personally can't conceive of any basis at all to believe that once an ultimate decision that entitles these people to their fees that they are not going to get them. [504] I pointed out there may be ultimate disputes, because there may be valid disputes, but when that is finally settled, I have no reason

whatsoever to believe that they won't pay those fees.

The Court: How long did Wadsworth's allotments lay in the Secretary of Interior's office without any action being taken on it?

Mr. Preston: From 1927 to 1944.

Mr. Brett: That is true.

The Court: 17 years.

Mr. Brett: Now, if the court please, that is not an entirely fair statement, and I am not criticizing it.

The Court: No. I have understood what you have said in defense of the Government's position, and I must say that it puts the Department of the Interior in much better light than its actions have been put in any opinion I have read in connection with these matters of any of the courts.

Mr. Brett: Unfortunately, apparently they did not either bring it home to the court or the Government was not represented in such manner as I think it should have been, but those are the facts.

The Court: But does it conform with our system of fair dealing to say "Yes" to the plaintiff; "yes; you may get the munitions of war with which to litigate the defendant, provided the defendant agrees to give you the munitions of war [505] with which to litigate"?

Mr. Brett: But I can only answer, if the court please, that that is the law and I do not think this court can vary it.

The Court: If that is the law, I would not attempt to vary it.

Mr. Brett: And I think, in other words, as I pointed out earlier this morning, if there is to be redress of that kind, it has to be in Congress, be-

cause what it is coming out of is property of the United States; it is not property of the Indian. You are not now stating: "Have I any means after the Indian gets the property to formulate rules and regulations so that it will be controlled, or to have it so it will be received for him and controlled."

That is not the argument. The question is: Is there any means whereby I can by mandate—because, if you can't by mandate, there would not be any use making the order, if you can't enforce it—is there any manner in which I can make an order against the United States which I can enforce, which will require the United States to do what I say? Now, that, we say, you cannot do in this proceeding.

As to what you can do with respect to Mr. Arenas or those who succeed under him, and with respect to that which he has to get, there is no issue. I do not think there is any question but that is before the court and within your power and authority. But I do say I have been unable to [506] find any law that gives you any slightest authority to give an order which will be binding upon and which this court can enforce upon and against the United States.

The Court: In *The Equitable Trust* case there is certainly dictum to that effect, isn't there?

Mr. Brett: No, your Honor. I think I endeavored to explain that in the brief, but I will make it just as explicit and succinct as I can.

The Court: I have read the brief.

Mr. Brett: I know, but I want to make it a little

clearer in view of what Judge Preston said. In *The Equitable Trust* case it is true there is a reference where we might assume that this fund is just the same as if it had been the land, but *The Equitable Trust* case, in the last analysis, went on one point and one point only, and that was that *The Equitable Trust* action, when it was commenced, was commenced against the property which the United States had completely released and which was in privately controlled hands. In *The Equitable* case the United States, of its own will, interceded to come in, not as the defendant, but as the plaintiff, as a co-plaintiff, as an intervening plaintiff, and by its own terms and by express conditions, said that it wanted to come in with the understanding, first, that the funds would be applied to paying the fees of these attorneys; and second, that certain orders, equitable [507] orders be made with reference to the distribution of the rest of the fund.

That is the distinguishing feature of *The Equitable Trust Company* case and the only thing that controlled *The Equitable Trust Company* case; and it is the basis, if the court please, under which those decisions that you referred to this morning did refer to. In other words, those decisions did refer to certain equitable relief, although those decisions were not, strictly speaking, matters of this character.

The Court: Those were actions under Section 345, Title 25.

Mr. Brett: That is right; but all the Circuit Court did was to refer to certain equitable considerations in those decisions.

In the Anglin case—Judge Preston brought that up—the distinguishing feature in the Anglin case is this: The court points out, first, the secretary did not have to be amenable to those. This court could not reach the Secretary. His decisions were discretionary, and he was completely free if he did not want to come into court and seek to have the heirship determined. He did not have to, and it says so verbatim in the decision. And had he done that, this court would have no jurisdiction, and they recognized that, but, they said, the Secretary of Interior did not elect to do [508] that. The Secretary of Interior elected, as a party plaintiff or intervener, to come in and seek a remedy from this court, to have this court determine who the heirs were, to have this court determine how the fund should be managed, etc.; and having done so, he therefore has made the United States amenable to this court. There is no question about that.

If we come into this court as a plaintiff or as an intervener or as someone asking affirmative relief, and ask this court to exercise its jurisdiction in aid of the United States as distinct from defensive relief, as we have all through here, by saying: If the court please, we are not before the court; we do not agree to submit to the jurisdiction, and we are merely pointing out to you that you have no jurisdiction, that is the effect of our argument so far as the United States is concerned.

If we had come in here and asked affirmatively for relief for the United States, there is no question in my mind that then this court would have

jurisdiction such as is being urged; but we do not have it in this proceeding.

The Ticonic case is equally with that. It had nothing to do with Indians, but the whole sum and substance of the Ticonic case is that that was an ordinary equity proceeding. We have had discussed here about the possibility of this proceeding being equitable in its nature. I want to tell [509] you another reason I do not believe it is equitable in its nature.

As I understand the theory of equity, if the court please, equity can only be brought about in behalf of those who do equity, and can only be brought about by those who are in a position that they cannot have said against them that they have violated good faith. I am not saying these petitioners have in this case, but what I am getting at is, under Section 345, Title 25, it is my considered judgment, and therefore I stated to your Honor, that an Indian could come into this court as a member of this tribe, who, the record may show, had violated 50 separate regulations of the Reservation, made by the Secretary of the Interior, who at that time was incarcerated in jail because he was of vile character and had in every way possible done everything he could to defeat the management and control of the Secretary of Interior, and get, if he could show the conditions precedent, to-wit, that he is a member of the Tribe, that he had occupied the property, that he had selected this particular property and that the property which he had selected was unallotted lands of this tribe, I am convinced that this court would

have to say: "Well, I can't help it, Mr. Brett, no matter what evidence you are trying to show in respect to that, I do not care what this Indian has done, he may be the most vile reprobate, he may be completely with [510] unclean hands, he may be wholly iniquitous, he may have ousted someone, but nevertheless, been there in such a way that he now has possession and is entitled to it; the fact remains one, two and three have been proven, and I have no alternative but to decide that the Secretary should have approved this allotment, and that is the decision I am going to make." If it were an equitable proceeding, I submit that that would not be true.

And I do not see any way that you can get around it. Certainly the Act is so clear-cut in the limitation upon the judgment to be rendered, and that is always a matter to be considered when you are seeking equitable power.

This is a case where the Act says specifically that it would have one single effect and no more, and every time that the Act has been referred to that has been the adjudication, and here is the language; it is very simple and succinct. It says this:

"The judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him * * *."

Now, that is all. There is not another thing that the United States has consented to and there is not another thing that should be done. [511]

The Court: The courts are given jurisdiction, to

read the preceding clause: "to try and determine any"—a very broad word "any"—"any action, suit,"—don't we usually refer to suits in equity, to actions at law?—"action, suit, or proceeding arising within their respective jurisdictions involving the right of any person,"—"involving," another broad word—"including the right of any person, in whole or in part of Indian blood or descent, to any allotment of land"——

Mr. Brett: That is true, your Honor.

The Court: "under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); * * *"

Mr. Brett: And then it says that the sale——

The Court: Isn't that equitable language, "suits"?

Mr. Brett: No.

The Court: "actions, suits or proceedings"?

Mr. Brett: Your Honor, those are merely descriptive terms that are frequently used, but the ultimate is that the only thing the court can determine is the factual status, and that is all you can determine. It does not even vest this court, as I pointed out this morning, with the jurisdiction which follows equitable relief, and that is to carry out the decree. This court has no jurisdiction to enforce allotment.

The only thing in the world this court can determine [512] is the allotment has the status as if the Secretary approved it. Beyond that you could not go.

Every time this Act has been referred to, in other words, in aid of it to enjoin others from interfering

with it, when it was sought in aid of it to enjoin others from interfering with the use, when it was sought to enjoin others from taking timber from the allotment, when it was sought to enjoin others from taxing the allotment, when it was sought to enjoin enforcement of eminent domain proceedings, in each case the court has said: No; you can't do that; Section 345 gives no such power; no such power is ever given to any court. Then you have to go to Congress. That is the place where you will have to get that right.

These trust patents, as I pointed out, are very unusual things, but they also are not entirely without some benefit.

I do not know whether the court is familiar with these facts, but not only is that property not subject to tax, the income from it is not subject to the income tax. The Indian has the absolute right, in case of any interference with that property, to have the aid of the United States Attorney and the power of the Federal Government to forthwith enforce the restrictions and remove any person who may be interfering with that right. There are many benefits to an Indian. [513]

The Court: What right does he have under your view?

Mr. Brett: And in addition to that, another important right, for example, is this: Many of these Indians are people of very limited means. One very definite assistance that they have had there—I realize it is a hue and cry for the whites, but it is a help to the Indian—is that all of these matters of

restricting their use of the property, of fixing the manner and character of development, etc., in the hands of the City of Palm Springs or the State, that authority is stayed because these properties are the properties of the Indians and because they are subject to the trust patent. So it is not something that is just one-sided and without any benefit.

The Court: I am sure it is for the benefit of the Indian.

Mr. Brett: I think, if the court please, I would like to briefly outline just what the Government's position is in this matter, and then I will be very happy again to answer any questions you desire to make. I want, if possible, to aid the court. I want you to understand, and I think I told you earlier in the very instance of this case, that I am not one who would obstruct any lawyers getting their fees. I am a lawyer. I have practiced longer outside than I have practiced as a representative of the Government, and I probably will be practicing again. But I do firmly [514] believe this, if the court please, that these gentlemen were not neophytes. They are not persons who were misled to their damage. These gentlemen were experienced lawyers. They were not only experienced lawyers generally, but by their own testimony as in the record here, had made a very careful and thorough examination of the law respecting these lands.

Mr. Clark said specifically in the interrogatories that he never gave any trust or circumstance to any hope that the Office of Indian Affairs or the Secretary of Interior or anybody else would approve any-

thing in the way of fees in favor of him; he did not look to them. He looked to his right and to his belief that in some way he could enforce it against their will.

Judge Preston said he was early acquainted with The Equitable Trust Company case and he did not rely upon anything except that; that he thought that was a means he could get.

Mr. Sallee was well qualified in this Indian law.

There is considerable complaint. They say why should not the Indian have a right that a white person has. I submit to you, if this were a white person, under settled law in California affecting these matters, they would not have any lien at all or there is no way they could enforce a lien. [515]

The Court: No question of a lien of attorneys here; it is not involved.

Mr. Brett: It is on charging the lien we are arguing here.

The Court: What is involved here is the taxation of costs between attorney and client under the old equity rule of jurisdiction.

Mr. Brett: But I submit, if the court please, that that would not apply in favor of a white person in California, certainly not, as Mr. Taheny stated, since the rule was established in the Erie case and the subsequent cases that brought equity within the same rule as the law.

The Court: But the courts all, every day, charge funds, charge against recovery.

Mr. Brett: But there is no fund, if the court

please; there is no fund. What fund is there in the hands of this court?

The Court: There is some land in the jurisdiction of the court, I should say, isn't there?

Mr. Brett: No; I do not think so. That is what I am endeavoring to point out to you, that there is no land in the jurisdiction of this court. The land, if the court please, belongs to the United States. Congress has the blanket power to do what it will with it, and it has given it to express agents, and those express agents are two and [516] two only. Apparently, whether it was right or wrong, they did not deem it advisable to charge it to the larger number such as if they had given the right to the judiciary.

The Court: Of course, there is no lien under the law of California here. That is not involved. This court of equity has probably a broader chancery power than is given to any state courts.

Mr. Brett: That is true.

The Court: This court has the power to deal and tax costs, not only between parties, but in chancery, to tax costs between solicitor and client, which is a practice where a fund is in the jurisdiction of the court. It is a practice several hundred years old in courts of equity. That is what is invoked here, as I see it. It is a question of whether Section 345 invokes the jurisdiction of the court to that extent.

Mr. Brett: That is true, if the court please, but that is not even exercised as against the sovereign unless the sovereign has made itself amenable to

that right. I do not think you could cite a case——

The Court: If this was a case taking away from the United States of America something that belongs to the Government and explained as public domain, purely and solely in the public interests, it might present a different question I would think.

Mr. Brett: If the court please, in my humble opinion——

The Court: But Lee Arenas is the beneficial owner of this land.

Mr. Brett: May I address a question to the court?

The Court: Yes. Otherwise, if he makes a lease for five years he gets full rental under the Section——

Mr. Brett: He does, providing——

The Court: —as against any other member of the tribe. He has the right of occupancy against all other members of the tribe.

Mr. Brett: But exclusive to him; but exclusive to him. He can't give it to anyone else.

The Court: What is the title, anyhow? Title is just a bundle of rights.

Mr. Brett: That is true.

The Court: And you may have a full bundle and you may have a half bundle and you may have a three-quarter bundle, or any in-between figure between nothing and whole, but it is title.

The United States Government does not claim this land, does it, as against Lee Arenas, except the right to manage it and to hold the title in trust for his use and benefit?

Mr. Brett: Well, I believe that it is implicit, also, that it holds the right at any time that it should elect to do so—and I mean I want to make it clear, because I know [518] we have an audience and we are sometimes misquoted—I have no understanding that there is any such intention—we are all merely talking about power as distinguished from making the use of power.

The Court: Certainly.

Mr. Brett: I think it has the power, and I think it is implicit through the Act of Congress to destroy all of these allotments together and cancel them all out, and I do not think there would be any remedy in anyone.

I think it has the power, to put it further, to destroy even the trust relationship in behalf of the property. I do not think it will, but it has the power. It is still public domain.

The Court: This is not treaty land?

Mr. Brett: No; it is not, your Honor.

The Court: If it were treaty land, do you think it would?

Mr. Brett: If it were treaty land, I do not think that it would; no, sir. But it is not treaty land.

The Court: A substitute for treaty land, is it not?

Mr. Brett: Sir?

The Court: A substitute for treaty land, isn't it?

Mr. Brett: No, your Honor.

Mr. Preston: I think, your Honor, if I may interrupt, it is land title to which has already passed out of the [519] United States into the Tribe.

Mr. Brett: No; it is not, your Honor. I introduced the deed in evidence in the Belardo case. The deed is in the United States and is a trust patent in favor of the Indian Tribe, issued by President Cleveland.

The Court: The Government took title to the lands when California was admitted to the Union.

Mr. Brett: That is correct; and I think it acquired certain portions from private ownership.

The Court: Rather, I should say, took title under the Treaty, I suppose, of Guadeloupe Hidalgo?

Mr. Brett: Yes, sir.

The Court: Without consulting the Indians at all, wasn't that so. And then, in order to make things right with the Indians, it being a *fait accompli*, so to speak, the Government declared a trust in the land for the benefit of the Indians, instead of negotiating treaties as it had done heretofore?

Mr. Brett: I think that is right, although I may be wrong. I can't keep everything in my mind. I have a recollection that these Indians were not on this particular land, actually, and were moved to this land.

The Court: I have that same recollection.

Mr. Brett: Yes. I would say, however, that your general statement is correct, that the Government unquestionably acquired its public lands as far as California is [520] concerned under the Treaty of Guadeloupe Hidalgo, without consulting the Indians or anyone else; and that where they were occupied by the Indians, that they did not consult with them as to what they did, excepting that I believe, as a

general practice, they made either arrangements for that land or for alternate land for their use. And then, of course, when the Allotment Acts were written in 1891, provisions were made under certain circumstances for several allotments.

But the point is: This is public domain; this is public land, and this particular formal order, whether you call it a charging lien or what you have, the proper and only method by which it can be effected is as against the United States.

The Court: Mr. Brett, suppose the United States owns other lands under a different character of ownership, as just recently it was decided that the United States owns the submerged lands off the coast here.

Mr. Brett: Yes, sir.

The Court: Suppose Congress passed a statute and said to the Attorney General of the United States, whenever he deems advisable, whenever he deems that compensation is due to some individual who has been hurt by the United States sometime in the past, or some group of individuals, may deed any portion of that land to him free and clear of all [521] encumbrances; do you think that would be constitutional?

Mr. Brett: Oh, I think it would be definitely constitutional.

The Court: It would be constitutional to empower the Congress, without setting up any standards, to delegate its power over the public domain to some official who could do with it as he pleases.

Mr. Brett: Well, now, if the court please, I did not understand that your first question——

The Court: Let us take something that is closer to us, probably, and a little better settled. The Government owns the lands up here in Elk Hills, the Naval Reserve.

Mr. Brett: Yes.

The Court: Suppose the Congress passed a law and said that whenever the Secretary of the Interior, if he meets up with somebody who has been harmed by the Government, may deed him one or more acres of that land, at his sole and own discretion, and may give him in the meantime an income from it, and may permit him to occupy it and make leases on it, etc.; would that be constitutional?

Mr. Brett: Well, I would answer that: At least, I think it would be debatable, but I have no doubt whether that would lay a sufficient foundation.

The Court: The United States could not itself delegate the power to dispose of the public domain, could it; and [522] Congress could not, could it, constitutionally? Would not that be a worse abrogation of power than was involved under NRA?

Mr. Brett: Well, I am trying, your Honor, to think quickly and informatively.

The Court: What I am trying to get back to is this:—it may not be clear what I am driving at— if these Indian lands are really and genuinely a part of the public domain of the United States of America, any enactment of Congress which says that one officer of the Government, an appointed officer in the cabinet, the Secretary of Interior, may give them away, taken them back, rent them, not rent them, give the income from them to the people or

not give it to the people, and may pick the people to whom he gives it, etc., it would be utterly unconstitutional, would it not?

Mr. Brett: Well, the only answer I can say is this: I made a research sometime ago of Title 40, Sections 258(a) to 258(f) in connection with eminent domain, which is part of the Declaration of Taking Statute, which was formulated after there had been some decisions that, because of the finality of the Declaration of Taking there was no manner in which the property could be returned or divested except by an Act of Congress. So they passed Section 258(f), the substance of which is that the United States Attorney General is the agent of Congress who may negotiate and stipulate with [523] owners for revesting of title.

It does not say anything more. It does not fix in there any arrangement. Of course, I think it is implicit in that Section that there has to be some justifiable basis for it. Congress, of course, has a justifiable basis in this matter in this: That it has established the policy of giving to these Indians these lands under certain conditions. It is an outright gift. It is not anything that they had; it is not anything to which they are entitled in the sense that there is a contractual basis or some other basis. If there were, then I submit, if the court please, that the case of *U. S. vs. Jackson* and others which say that it is not unconstitutional to take them back again would not be a proper decision.

The only possible justification of that is that there is no right, as such, that is vested in the Indian

which he can enforce, no contractual right or no other right which gives him a vested interest; but it is the congressional policy of this Government in an endeavor to oversee the affairs of the Indians, to make them self-supporting, to give them an opportunity and an incentive to better themselves, under conditions to give them use of property and ultimately to give them title to the property.

Now, the Congress very frequently entrusts that to agents, and the law is quite clear, if the court please, that [524] when Congress entrusts that to an agent, at his discretion, that the courts have no jurisdiction whatsoever in connection with that. I might cite to your Honor a case that has not been cited before, that I checked since Judge Preston and Mr. Clark suggested that, as I would say, indirectly as a part of this equitable jurisdiction, they ask you, the chancellor, that you mandamus the Secretary; or, as Mr. Clark said, to seize upon the conscience of the Secretary, assume that he could do what ought to be done and required to do it. That, of course, could only be done by what I call mandamus.

In a decision of the United States *ex rel. Roughton v. Ickes*, Secretary of the Interior, 101 Fed. (2d) 248, pages 252 and 253, that express matter is referred to; and the decision is by Mr. Justice Vinson who is now the Chief Justice of the United States Supreme Court. I am not going to take time to read it because we are taking too much time, anyhow. But the gist of it is this: The court points out that where the act is one which is fixed and is the

duty of the officer to do, and a duty to which one is directly entitled, then of course mandamus will lie; but where the right is one which is within the power and authority of the representative of the Government, of the executive officer or the agent, but is to be done at his discretion, there is no power of mandamus to make him act in any particular way or to make him act at all, excepting this: If as an incident [525] of it there is some action to be taken—I mean if there is a duty to do something but not in a specific way—the court may require him to take some action. If he acts arbitrarily or capriciously, the court can avoid the action that he took; but the court may never place itself in his shoes and exert the discretion with which he is entitled to act. That is what you would have to do in this case.

The Court: I do not suppose there would be any dispute about that as a matter of law.

Mr. Brett: Let me put it this way: That was an improper word and I wish to withdraw it. If you decide to follow the suggestion that was made here yesterday, the ultimate result would be that would be what you would have to do, because the only power that is in the Secretary is a discretionary power. It says that he may, in his discretion, do this. He is required to exercise the discretion; he is required to determine whether, under the circumstances that exist in that particular case, it is appropriate and right.

Now, if you order him to do that, you would have to suspend that discretion. You would have to say: Do not exercise your discretion, because then you

would not necessarily effect your remedy. He might exercise it differently than you would feel that he should. You would have to say: Instead of exercising your discretion, you do a specific thing which, in my discretion to act as a chancellor, I believe to be the right and appropriate thing to do.

I believe, if the court please, under that decision of the Circuit Court of Appeals for the District of Columbia, which has rendered most of those decisions because the executive officers reside in Washington, there are numerous decisions cited by Justice Vinson which clearly show that that is the law.

The Court: I do not think there would be any contention to the contrary, Mr. Brett. I would not consider attempting to tell an executive officer of the executive branch of this Government how he should exercise his discretion.

What is asked here, as I understand it, is that this court act upon the land, the land being within the jurisdiction of the court for the purpose of this action. This is a supplemental proceeding in the main action.

I understand the theory of the petitioners is, it being a court of equity and the equity jurisdiction having been invoked for the purpose of making the allotment, that now, the res being in the hands of the court and the part recovered for Lee Arenas—I use “recovered” advisedly, but whatever interest he has had in these lands has been recovered for him in this action and is within the jurisdiction of this court—that this court now tax costs between solicitor and client, if you please, in the old equit-

able tradition, and charge the recovery with the costs of the solicitors. [527]

Mr. Brett: Now, if the court please, that brings me to the question which I asked or requested leave a moment ago to ask. I want to ask a question. I have been giving it serious consideration, and maybe I am not as well grounded as perhaps I think I am.

It has always been my conception that the ultimate a chancellor in equity could do indirectly or, I would say, contrary to the express desire or will of a litigant, could never exceed that which the litigant would have the lawful power and authority to do expressly. In other words, if what was asked to be done was something that the litigant could not expressly do himself, either because he neither had the right, for instance, he did not own the land or the property and therefore could not in any way affect it, or the law stepped in and said that you may not do it, it would be an unlawful offense if you did it, or would be against public policy, it would seem to me that that would be the ultimate limit upon the chancellor. In other words, the chancellor could not do for him or in his name, against him, if you will, but nevertheless, in a sense for him, sort of circuitously that which he could not legally do himself.

The Court: That sounds very plausible, but you stop and consider The Equitable Trust case. Barnett could not touch that money, those bonds, but a court of equity took, ultimately—first, the District Court—what was it, [528] \$150,000?

Mr. Brett: Yes.

The Court: And then the Circuit Court, \$100,000, and the Supreme Court of the United States, \$50,000, when Jackson Barnett could not have taken 50 cents out of it.

Mr. Brett: I think, however, your Honor, the answer to that is this: The United States, of course, was representing Jackson Barnett, just as it represents all of these Indians. The United States does have that authority.

The Court: Your point there is that the Government was there as an active litigant. There, it, itself, invoked the jurisdiction of the court?

Mr. Brett: That is it; and it, itself, asked to do that very thing. I think that, just as the Supreme Court, through Mr. Justice Jackson, said, in determining this one factor that the Secretary has to determine that the Indians in this particular area were qualified to receive allotments, that is, that they had reached that stage of civilization and were able to take care of their affairs, that he did not have to do it by any express writing or express formula; that he could do it by words or by demeanor; and that the same thing would apply with reference to this right of the President or the Secretary of the Interior, as given here under Section 392, to determine that restrictions should either be taken completely off or partially off of these [529] restricted properties.

I think that the Secretary would not have to do it, if the court please, by saying that by reason of the authority vested in me by Title 25, Section 392. He could do it just as effectively, I think, by com-

ing into this court and saying in this court: We desire a certain particular thing in behalf of such an Indian, and in order to assist that thing being done we ask that the court make certain distribution of fees or distribution of property; and I think by invoking that authority of the court, that would then be invoking the authority that is definitely with the Indians.

The Court: Of course, that, to my mind, is the biggest distinction between The Equitable Trust Company case and the case here at bar. Whether it is a determinative distinction is the problem in this case.

Mr. Brett: That is my thought.

The Court: But, whereas there was no basis for sovereign consent to be sued in The Equitable Trust Company case, the court relied for jurisdiction upon the fact that the Government had itself invoked the jurisdiction of the court, and cited the old Siren case and The Thekla case on page 746 of 283 U. S., whereas here the position of the sovereign to consent to be sued is to be found in an Act of Congress, and we must determine what is the content of that [530] consent.

It is usually strictly construed, to be sure. There are cases which always say that the consent of the sovereign to be sued, the statutes are to be strictly construed. There are other cases that say when the consent is given, it must be liberally interpreted in order to effectuate the purposes of it. So, with those guides, we have to determine how far Section 347, Title 25, lets down the bars against action that

binds the sovereign. Isn't that our problem here?

Mr. Brett: Yes; that is right. Now, then, there is this factor to be considered, I think, in connection with that. It is the definite rule of law in all jurisdictions that I know of and it has been squarely held by the United States Supreme Court, that although equity is broad and although equity will endeavor to fill in the gaps, if gaps exist, equity follows the law, and it not only follows the law, but equity will not supplant the law to the extent of giving a remedy where no remedy exists, if the effect of the law is that to give that remedy would be to violate the law.

The Court: Wasn't it Lord Bacon who said that equity is made to uphold the law and not to subvert it or something to that effect?

Mr. Brett: A good case, I think, if the court please, not an Indian case but a case that I think would be helpful, that is not cited heretofore, but I would like your Honor to [531] read, is the case of *Hedges v. County of Dixon*; that is cited in 140 U. S. 183, and I am reading from Law Edition. It is 37 L. Ed. page 1044, and particularly page 1048.

The gist of this action was this: That certain bonds had been voted which were contrary to the Constitution, so they were against public policy and against law, because they were in excess of the amount that could be voted. The plaintiff in this particular action, making a fine showing, as you will see from reading it, of an equity cause of action that was taken, offered to relinquish the amount that was above the excess, and asked equitable relief

to enforce the right of having taxes levied to pay the bonds. It went to the Supreme Court. The court cites a number of authorities, and then I would just like to read this part:

“The principle running through these decisions controls the case under consideration, and clearly establishes that the complainants are not entitled to the relief they seek.”

The relief, incidentally, was equitable in the way of mandamus.

“The fact that the complainants have no remedy at law, arising from the invalidity of the bonds, confers no jurisdiction upon a court of equity to afford them relief. The established rule, although not of universal application, is that equity [532] follows the law, or, as stated in *Magiac v. Thomson*, cited here, ‘that wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle these rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.’

“Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not

in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof. * * *”

Now, let us analyze the situation here. As I pointed out in the brief, the Congress of the United States has said with particular reference to these particular allotments, that while they are in the trust patent stage no one—it [533] does not say any particular one—no one can make any form of contract concerning them that will be either in the form of a lien or that will alienate, that is, transfer them.

That has been upheld against the Government itself in income tax provisions; it has been upheld against the states in tax provisions and in the exercise of eminent domain; and it has been upheld in every form and substance of theory that has been made to enforce any form of execution of judgment against it.

The Sherburne case for the Ninth Circuit is an excellent one, for example. There was no question about equity there so far as the people being entitled to their money.

The Court: If the petitioners relied upon the contract to give them recovery here, if that was all the basis they had, I would not think they had anything.

Mr. Brett: But can the petitioners, if the court please, come into a court of equity or a court of law and say that we know, as they must have known—they were not only deemed to know but they had

specific knowledge which was given to them by the Commissioner of Indian Affairs in a letter in which he specifically told them verbatim that if you are trying to reach the United States property or any part of it, you can't do it, one of the exhibits in evidence—we presume that these men must have read the letter and that they must have understood it; but in addition to that, there [534] was a public law of long standing, and they investigated the law thoroughly. They knew distinctly that that right was proscribed to any Indian; they knew that that right was proscribed to the white man; and they knew that any one of them that violated that was violating the law of this country—period.

By what possible principle of equity——

The Court: It does not matter whether they relied or not, does it? Take *Mrs. Sprague, in Sprague v. Ticonic Bank*; she had no thought at the time she started her litigation, she had no thought of forcing people who were then unknown to her, by forcing in effect the fund of people who were unknown to her to help defray the expense of her litigation. She undoubtedly intended to defray it all until her attorney discovered the result that she had accomplished had benefited these trust funds standing in like circumstances, and hence, equitably, in good conscience, should bear part of the expense. And Mr. Justice Frankfurter, in his very scholarly opinion, in speaking for the Supreme Court, upheld it.

I had in this court a case in which some bond holders brought a suit, a very selfish suit. They had no intention of benefiting anyone but themselves,

but it happened that the litigation benefited all the bond holders and the shareholders, too, in a tremendous amount. And then after the litigation was all over, the attorneys for [535] the plaintiff and the intervening bondholders came in. The bondholders had already paid their lawyers, showing how little they had relied upon having some fund bear the expense, but under the authority of the Ticonic Bank case I felt duty-bound to award those parties their expenses against all the stockholders and bondholders of the corporation who had been so greatly benefited as the result of the litigation.

Mr. Brett: That is true.

The Court: There was no reliance at all, Mr. Brett.

Mr. Brett: If the court please, undoubtedly implicit in the arrangement is this, however, that the parties should not receive benefits and then not pay the equivalent of a reasonable price for getting those benefits. Now, in that particular instance those stockholders, those bondholders, whoever they might have been, out of whose money it actually came, they had the express legal authority. They did not have any restriction upon their authority. They never made that same contract that those attorneys should pay them those monies; so you were only doing in equity that which they should have done.

But the United States is not in that position. The United States does not owe these people anything. The United States never held out to them anything, and the United States has received no benefits from them for which [536] they should pay.

The Court: Don't you imagine that those people who happened to have funds in the savings department or the trust department of that bank, the Ticonic Bank, were shocked to know that they had to stand a share of the expenses of Mrs. Sprague's litigation?

Mr. Brett: I don't doubt that.

The Court: Or about which they had probably never heard?

Mr. Brett: I don't doubt that. And I would say this: There is nothing being taken away from them for which they did not receive any benefit.

The Court: There is nothing being taken away from the United States here, is there?

Mr. Brett: Yes, your Honor.

The Court: Is there any suggestion that there is anything that the United States claims the beneficial ownership of as sovereign being taken away?

Mr. Brett: Well, very definitely. This property still belongs to the United States. It is subject to its control.

The Court: Isn't the situation this: That here is some property in the hands of the trustee and the trustee will not pay, and the petitioners say the fund is in the hands of the court or, rather, the complete disposition of the controversy, having undertaken the disposition of the [537] controversy?

Mr. Brett: Your Honor, if this fund were in the hands of the court, as you say, if this land were in the control of the court, wouldn't it necessarily follow that if someone were seeking to take some of that land, that you could enjoin them; that if some-

one were seeking to take some property from that land, that you could enjoin them; that if someone were seeking to utilize an increment from that land, that you could make some order respecting it? You can't do that. You have no jurisdiction to do that.

The Court: Well, that is a question about how far the United States has consented to be sued under your Section 345, Title 25. That is the whole question here as far as the power of the court to affect an interest in that property is concerned.

Mr. Brett: I do not believe that I can give you any more than I have in the briefs.

The Court: The United States is here in this lawsuit.

Mr. Brett: Yes, sir.

The Court: Arenas is here in this lawsuit.

Mr. Brett: Yes, sir.

The Court: And the land is in the jurisdiction of the court for the purpose of the court acting upon it to the extent of taking it and saying that it is allotted to Lee Arenas. [538]

Mr. Brett: I can't agree that that is true. I do not believe that this court—well, let me state this:—

The Court: The court put Lee Arenas in the relationship of an allottee to this particular land.

Mr. Brett: That is right.

The Court: The United States did not do it.

Mr. Brett: That is right.

The Court: This court said, as to lot so and so Lee Arenas is the allottee.

Mr. Brett: That is correct.

The Court: All right.

Mr. Brett: But all that that gives——

The Court: How do you affect land? You do not bring the land into the courtroom.

Mr. Brett: No; that is true.

The Court: You affect it by changing the relationship of the parties to the land, do you not?

Mr. Brett: Your Honor, may I again ask——

The Court: Before this court rendered a final judgment that was tribal land. After the judgment was rendered the court had placed Lee Arenas in the possession as against all members of the Palm Springs Tribe. He, and he alone, was the allottee of that land; and he, and he alone, was entitled to the occupancy of it, the utility, isn't that true?

Mr. Brett: That is true. [539]

The Court: And the question is: Do those elements, those incidents of jurisdiction, do they carry on to the point of enabling the court to do as it could in other equity cases, complete justice among the parties by taxing costs between solicitor and client as it could if they were private litigants?

I take it there would be no question in your mind if this were just Lee Arenas against John Smith that these petitioners could have the relief they ask for, is there?

Mr. Brett: On the contrary, I do not think in California they could, not even in this court. I think this court would be bound by California law.

The Court: What California law?

Mr. Brett: Sir?

The Court: What California law?